

First Judicial District of Pennsylvania

51CR00047732011

Johnnie Simmons

*Trial (Jury) Volume 1
December 12, 2011*



*First Judicial District of Pennsylvania
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[1] IN THE COURT OF COMMON PLEAS
[2] FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
[3] CRIMINAL TRIAL DIVISION
[4] ---
[5] COMMONWEALTH : CP-51-CR-0004773-2011
[6] :
[7] vs. :
[8] JOHNNIE SIMMONS :
[9] :
[10] ---
[11] COURTROOM 908
[12] CRIMINAL JUSTICE CENTER
[13] PHILADELPHIA, PENNSYLVANIA
[14] ---
[15] Monday, December 12, 2011
[16] ---
[17] BEFORE: THE HONORABLE SANDY L.V. BYRD, J.
[18] ---
[19] ---
[20] APPEARANCES:
[21] STACY FORCHETTI, ESQUIRE
[22] For the Commonwealth
[23] VINCENT LORUSSO, ESQUIRE
[24] For the Defendant
[25] KIM S. KENDALL, RPR
OFFICIAL COURT REPORTER

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[1] THE COURT: On the record in the trial
[2] case of Commonwealth versus Johnnie Simmons,
[3] CP-51-CR-0004773-2011. Simmons is here, the
[4] attorney Mr. Lorusso, are you ready?
[5] MR. LORUSSO: I am.
[6] THE COURT: Ms. Forchetti.
[7] MS. FORCHETTI: Yes.
[8] THE COURT: How many witnesses do you
[9] expect to call today?
[10] MS. FORCHETTI: I expect to call two more
[11] witnesses, Your Honor. And also have the
[12] medical records moved in by way of stipulation.
[13] THE COURT: All right. I need to colloquy
[14] the defendant on the stipulation. I need you
[15] to tell me what the stipulation is so that I
[16] don't have the scenario where one person is
[17] reading the stipulation and the other person is
[18] saying I didn't agree to that. Have you
[19] written it out?
[20] MS. FORCHETTI: I've written out extensive
[21] notes in terms of what all the medical records
[22] reflect.
[23] THE COURT: You two need to agree on the
[24] stipulation. As soon as you do we'll have a
[25] colloquy.

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[1] MS. FORCHETTI: Your Honor, I went over my
[2] notes with Mr. Lorusso and I believe we are
[3] clear.
[4] THE COURT: All right.
[5] Mr. Lorusso, just advise your client of
[6] what a stipulation is to see if he has any
[7] objection.
[8] MR. LORUSSO: My issue that I might have,
[9] Your Honor, is Gerald Wright is still under
[10] subpoena and I haven't seen him here this
[11] morning yet.
[12] THE COURT: You have a number for him?
[13] MS. FORCHETTI: I do, Your Honor. You
[14] want me to contact him?
[15] THE COURT: Either one of you. Whichever
[16] one you think can get him in here.
[17] MR. LORUSSO: I have discussed the
[18] stipulation with my client.
[19] THE COURT: As soon as you make your phone
[20] call I'll colloquy your client and we'll get on
[21] the way.
[22] ---
[23] THE COURT: Let's swear in Mr. Simmons
[24] please.
[25] COURT CRIER: State your full name and

[1] spell your last name.
[2] **THE DEFENDANT:** Johnnie Simmons,
[3] S-I-M-M-O-N-S.
[4] - - -
[5] JOHNNIE SIMMONS, after having been
[6] duly sworn, was examined and testified as
[7] follows:
[8] - - -
[9] **THE COURT:** Tell us your name again.
[10] **THE DEFENDANT:** Johnnie Simmons.
[11] **THE COURT:** How old are you, sir?
[12] **THE DEFENDANT:** 20.
[13] **THE COURT:** What is your date of birth?
[14] **THE DEFENDANT:** March 15, 1991.
[15] **THE COURT:** How far did you go in school?
[16] **THE DEFENDANT:** To high school.
[17] **THE COURT:** What's the highest grade you
[18] completed?
[19] **THE DEFENDANT:** Ninth.
[20] **THE COURT:** Where was that?
[21] **THE DEFENDANT:** King High School.
[22] **THE COURT:** Do you read, write, and
[23] understand English?
[24] **THE DEFENDANT:** Yes.
[25] **THE COURT:** Have you ever been diagnosed

[1] than an agreement; do you understand that?
[2] **THE DEFENDANT:** Yes.
[3] **THE COURT:** The medical records are not a
[4] mystery in this case. They have been
[5] subpoenaed and/or available to both sides so
[6] your attorney and the Assistant District
[7] Attorney knows what's contained in those
[8] records; you understand that?
[9] **THE DEFENDANT:** Yes.
[10] **THE COURT:** It is a document available for
[11] inspection by both sides, is that clear to you?
[12] **THE DEFENDANT:** Yes.
[13] **THE COURT:** Your attorney has indicated as
[14] has the Assistant District Attorney that there
[15] is a stipulation that if the custodian of
[16] records were called he or she will articulate
[17] what is contained in the records; do you
[18] understand?
[19] **THE DEFENDANT:** Yes.
[20] **THE COURT:** Now, you could compel the
[21] Commonwealth to subpoena the custodian and have
[22] him or her come in, take the stand, and tell
[23] the jury what's in the records or you could
[24] agree to have the stipulation read to the jury
[25] where your attorney and the Assistant District

[1] with or treated for a mental illness or
[2] disease?
[3] **THE DEFENDANT:** No.
[4] **THE COURT:** Are you now under the
[5] influence of drugs, alcohol, or medication?
[6] **THE DEFENDANT:** No.
[7] **THE COURT:** Mr. Simmons, you appreciate
[8] that you are the defendant in this case,
[9] correct?
[10] **THE DEFENDANT:** Yes.
[11] **THE COURT:** You've been here throughout
[12] the trial and you are aware of the various
[13] rights that's been afforded you by our
[14] Constitution, agreed?
[15] **THE DEFENDANT:** Yes.
[16] **THE COURT:** One of those rights is the
[17] right to confront and/or cross-examine
[18] witnesses called against you, you seen that
[19] played out over the last week of trial, is that
[20] a fair statement?
[21] **THE DEFENDANT:** Yes.
[22] **THE COURT:** Your attorney and the
[23] Assistant District Attorney have advised me
[24] that regarding the medical records there is a
[25] stipulation. A stipulation is nothing more

[1] Attorney agree and have that information
[2] relayed to the jury, the fact finders, in this
[3] case; do you understand that?
[4] **THE DEFENDANT:** Yes.
[5] **THE COURT:** When you stipulate you give up
[6] the right to confront and/or cross-examine that
[7] custodian; do you understand?
[8] **THE DEFENDANT:** Yes.
[9] **THE COURT:** Now, the law is as follows,
[10] sir, when the Commonwealth and the defense
[11] stipulate, that is when they agree that certain
[12] facts are true then that stipulation is
[13] evidence of those facts and the jurors will be
[14] instructed to regard stipulated or agreed upon
[15] facts as proven, is that clear to you?
[16] **THE DEFENDANT:** Yes.
[17] **THE COURT:** Now, would you please, Ms.
[18] Forchetti, advise the defendant on the record
[19] what the agreement is that you and Mr. Lorusso
[20] have come to.
[21] **MS. FORCHETTI:** Yes. Your Honor, there
[22] has been an agreement by and between counsel
[23] that were Dr. Mark Captain called to testify he
[24] would state that he was the attending physician
[25] on duty at Albert Einstein Medical Center on

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[1] February 4, 2011. At which time Mr. Charles
[2] Tolbert at the time of 14:25, that's 2:25, in
[3] the afternoon Mr. Tolbert was admitted as a
[4] level one trauma. When he was admitted he was
[5] observed to have multiple gunshot wounds. He
[6] went in for an emergent exploratory laparotomy.
[7] He was also operated on and had a small bowel
[8] resection in three different places. There was
[9] a partial rectal resection as well as a partial
[10] splenic flexure resection. He was intubated
[11] and sedated.

[12] On the following day, February 5th, he
[13] went back into the operating room for
[14] additional surgery. He had another exploratory
[15] laparotomy. There was a removal of packing.
[16] He had a left colectomy, a transverse
[17] colostomy. He had a Reanastomosis in two
[18] separate parts and his abdominal wall was
[19] closed. He was in guarded and intubated
[20] condition at that time.

[21] It was observed that he had a bullet
[22] lodged in the medial left gluteus maximus, that
[23] he had a comminuted fracture of the distal
[24] sacrum or proximum coccyx that was medial to
[25] the bullet wound. There was a bullet lodged in

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[1] the superficial back soft tissues. And there
[2] was evidence of a bullet fragment overlying the
[3] heart. A chest x-ray showed that that's where
[4] the bullet lie. He was found to have two
[5] bullet wounds in his right upper extremity and
[6] remained on an IV diet until February 11th at
[7] which time he was permitted to have clear
[8] liquids at that time. He remained at Albert
[9] Einstein Medical Center until February 22nd.
[10] For the last several days of his stay he was
[11] transferred from the SICU down to the general
[12] floor. It was observed that he was in police
[13] custody at the time and that recovered from him
[14] upon his arrival were 38 bags of a green leafy
[15] substance that was turned over to the police.
[16] There was also a small bullet like material
[17] that was turned over to the police at that
[18] time. He was diagnosed as having acute stress
[19] disorder and antisocial personality disorder.
[20] During his stay he developed several fevers and
[21] it was observed that he had a peritoneal
[22] abscess that required several different
[23] draining. Your Honor, that's a summary.

[24] **THE COURT:** Is that stipulated?

[25] **MR. LORUSSO:** It is, Your Honor.

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[1] **THE COURT:** Mr. Simmons, did you hear the
[2] proposed stipulation?

[3] **THE DEFENDANT:** Yes.

[4] **THE COURT:** Are you in agreement that may
[5] be read to the jury without the necessity of
[6] bringing in the treating physician or the
[7] custodian of records?

[8] **THE DEFENDANT:** Yes.

[9] **THE COURT:** Did you discuss this with your
[10] attorney?

[11] **THE DEFENDANT:** Yes.

[12] **THE COURT:** Are you satisfied with his
[13] services?

[14] **THE DEFENDANT:** Yes.

[15] **THE COURT:** Did anybody force you or
[16] threaten you to enter into the stipulation?

[17] **THE DEFENDANT:** No.

[18] **THE COURT:** Is this your decision?

[19] **THE DEFENDANT:** Yes.

[20] **THE COURT:** Is it made of your own free
[21] will?

[22] **THE DEFENDANT:** Yes.

[23] **THE COURT:** We'll accept the stipulation.
[24] Counsel, is your first witness ready?

[25] **MS. FORCHETTI:** I believe so.

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[1] **THE COURT:** Let's bring the jurors out.

[2] It's 10:00 o'clock. We still haven't heard
[3] from the court administration of the assigned
[4] cases out. If you want to come back in a half
[5] hour, counsel, maybe I'll know something then.

[6] - - -

[7] (The jury entered the courtroom at
[8] 10:03 a.m.)

[9] - - -

[10] **THE COURT:** Good morning, ladies and
[11] gentlemen. You may call your next witness.

[12] **MS. FORCHETTI:** Thank you. Your Honor, at
[13] this time the Commonwealth calls Detective
[14] Timothy Hartman.

[15] **COURT CRIER:** State your full name, spell
[16] your last name, badge number, and assignment.

[17] **THE WITNESS:** Detective Timothy Hartman,
[18] H-A-R-T-M-A-N, Badge No. 9206, assigned to
[19] Northwest Detectives.

[20] - - -

[21] DETECTIVE TIMOTHY HARTMAN, after
[22] having been duly sworn, was examined and
[23] testified as follows:

[24]

[25]

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[1] ---
[2] DIRECT EXAMINATION
[3] ---
[4] **BY MS. FORCHETTI:**
[5] **Q** Good morning, Detective. Detective, how
[6] long have you been with the Philadelphia police?
[7] **A** Twelve years.
[8] **Q** How much of that time have you spent in
[9] Northwest as a detective?
[10] **A** Six as a detective in Northwest.
[11] **Q** During that time as a detective in
[12] Northwest have you developed a particular specialty?
[13] **A** Right now I'm assigned to the special
[14] investigations unit and one of my main
[15] responsibilities is to process crime scenes.
[16] **Q** Did you process a crime scene of a
[17] shooting that had occurred on February 4, 2011 in
[18] the area of Stenton and Johnson Streets?
[19] **A** Yes, I did.
[20] **Q** When did you arrive at that crime scene?
[21] **A** It was sometime in the afternoon. I
[22] believe it was probably around 2:30 or three o'clock
[23] in the afternoon.
[24] **Q** Was that your first step in this
[25] investigation, your first part of your involvement?

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[1] as fired cartridge casings or other evidence or
[2] something somebody may have discarded and I didn't
[3] find anything other than that white bloody towel and
[4] the stuff left at the store.
[5] **Q** Did you then take photographs of the area?
[6] **A** I did. I took overall photographs of the
[7] entire area.
[8] **MS. FORCHETTI:** Your Honor, I would ask
[9] that the witness be shown what has been marked
[10] as C-1, C-2 and C-4 through C-7.
[11] **THE COURT:** The witness may be shown those
[12] exhibits.
[13] **MS. FORCHETTI:** I would ask to mark
[14] additional photographs as Commonwealth's
[15] Exhibit 23, 24, 25, 26, and 27.
[16] **THE COURT:** So ordered.
[17] ---
[18] (Commonwealth's Exhibits 23 through
[19] 27 were marked for identification.)
[20] ---
[21] **BY MS. FORCHETTI:**
[22] **Q** Detective, you're being shown let's start
[23] first with the photographs that have been marked as
[24] Commonwealth's Exhibit 1 and Commonwealth's Exhibit
[25] 2. Do you recognize those?

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[1] **A** Yes, it was.
[2] **Q** When you arrived in the area of Stenton
[3] and Johnson Streets what did you observe?
[4] **A** There was two other detectives already
[5] there and some 14th district police officers there
[6] securing the scene. They had some police cars
[7] blocking some roads and some yellow police tape
[8] around blocking everybody out of the scene.
[9] **Q** So when you arrived and you see that,
[10] detective, what do you then do?
[11] **A** I speak with the officers or anybody
[12] that's on location to see what they know that I
[13] don't know as I'm pulling up.
[14] **Q** What did you find out?
[15] **A** The only thing that they had located was a
[16] white towel in the middle of Johnson Street that had
[17] what appeared to be blood on it. It was some red
[18] substance and there was some red blood in the snow
[19] on the ground. There was some items inside a store,
[20] a sneaker store on the corner of Stenton and Johnson
[21] still left at the counter and they then closed the
[22] store for business. They stopped letting customers
[23] go in and out. When I arrived I did my own thorough
[24] search. I walked through a lot of the alleyways and
[25] the streets looking for any physical evidence such

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[1] **A** I do.
[2] **Q** Are all of the photographs in front of
[3] you, C-1, C-2, C-4 through C-7 and C-23 through C-27
[4] photographs that you have taken?
[5] **A** Yes, they are.
[6] **Q** Do those photos fairly and accurately show
[7] what the scene looked like on the day you were
[8] present?
[9] **A** They do.
[10] **Q** Did you recover any physical evidence from
[11] the scene?
[12] **A** The items from inside the sneaker store
[13] were recovered and later returned to Mr. Tolbert.
[14] **Q** Did you have contact with Mr. Tolbert or
[15] any of the witnesses?
[16] **A** No, I didn't.
[17] **Q** Was a crime scene log prepared in this
[18] case?
[19] **A** There was, yes.
[20] **MS. FORCHETTI:** Your Honor, I would ask
[21] this two-page document be marked as
[22] Commonwealth's Exhibit 28.
[23] **THE COURT:** It may be marked.
[24] ---
[25] (Commonwealth's Exhibit 28 was marked

[1] for identification.)
[2] ---
[3] **BY MS. FORCHETTI:**
[4] **Q** Detective, you're being shown a document
[5] that's been marked Commonwealth's Exhibit 28, do you
[6] recognize that document?
[7] **A** I do.
[8] **Q** What is that?
[9] **A** It's the crime scene log that was prepared
[10] by Police Officer Carroll of the 14th district.
[11] **Q** Can you explain to the members of the jury
[12] what is a crime scene log?
[13] **A** Yes. A crime scene log any time a patrol
[14] responds to a crime scene the initial responding
[15] officer his responsibility is to secure that crime
[16] scene after making sure he's safe and renders first
[17] aid then you want to protect the crime scene so we
[18] can come collect evidence. Once you protect that
[19] crime scene you're supposed to fill out what's
[20] called a crime scene log and it will list various
[21] preliminary information along with any and all
[22] people who entered the crime scene such as myself or
[23] any other officers just so there's documentation of
[24] who came to that crime scene.
[25] **Q** Detective, once the initial officer begins

[1] the crime scene log?
[2] **MR. LORUSSO:** Objection.
[3] **THE COURT:** Overruled.
[4] **THE WITNESS:** In this case there is not.
[5] **BY MS. FORCHETTI:**
[6] **Q** Is there information about where the
[7] victim was being treated?
[8] **A** Yes; Albert Einstein Hospital.
[9] **Q** Is there information about a description
[10] of a suspect?
[11] **MR. LORUSSO:** Objection.
[12] **THE COURT:** Overruled.
[13] **THE WITNESS:** Yes. A light skinned black
[14] male, dark hoodie, black skully with braids.
[15] **BY MS. FORCHETTI:**
[16] **Q** Now, detective, in the photographs that
[17] depict the area it appears that there's a
[18] significant amount of snow and ice on the ground, is
[19] that accurate?
[20] **A** There was snow and ice on the ground, yes.
[21] **Q** How does that affect your investigation in
[22] terms of recovering physical evidence?
[23] **A** I'm still going to do the same thorough
[24] search and try to make sure I don't miss anything
[25] but obviously it does hinder it a little bit. If a

[1] the crime scene log and detectives arrive do the
[2] detectives take over the crime scene from the
[3] officer?
[4] **A** Yes.
[5] **Q** Is that what happened in this case?
[6] **A** It is.
[7] **Q** So what sort of information other than as
[8] you've told us which officers are present, what
[9] other kinds of information appears on the crime
[10] scene log?
[11] **MR. LORUSSO:** Objection.
[12] **THE COURT:** Sustained.
[13] **BY MS. FORCHETTI:**
[14] **Q** In this particular case, detective, was it
[15] noted what kind of evidence, if any, was recovered?
[16] **A** I believe it notes what kind of evidence
[17] was present.
[18] **Q** What is noted there?
[19] **A** It has blood in the street, a white towel,
[20] and inside the store, a cell phone, bag, and
[21] clothes.
[22] **Q** Does the victim's name appear on the crime
[23] scene log?
[24] **A** It does, yes.
[25] **Q** Are there any other witnesses listed on

[1] fired cartridge case comes out of a firearm when it
[2] comes out it's going to be hot, if it hits the snow
[3] or ice it could melt, go under and then be recovered
[4] so it may be something we can't locate if it is out
[5] there.
[6] **Q** Detective, how long were you on the scene
[7] of Stenton and Johnson?
[8] **A** If I recall I was there at least an hour.
[9] **Q** Were there other people out on the street?
[10] **A** There were, yes.
[11] **Q** Now, following your conclusion at the
[12] crime scene was that the extent of your role in this
[13] investigation?
[14] **A** Yes.
[15] **MS. FORCHETTI:** Thank you, detective.
[16] **THE COURT:** You may cross-examine.
[17] **MR. LORUSSO:** Thank you, Your Honor.
[18] ---
[19] CROSS-EXAMINATION
[20] ---
[21] **BY MR. LORUSSO:**
[22] **Q** Good morning, detective.
[23] **A** Good morning.
[24] **Q** Detective, C-1, the photograph that you
[25] took, would you be kind enough to hold that up. So

[1] that depicts the white Lexus and an apartment
[2] building on the right side, I guess, right and then
[3] there's a driveway just to the left of that
[4] apartment building?
[5] **A** That's correct.
[6] **Q** You say that that area when you arrived at
[7] the location had been cordoned off with police cars
[8] and yellow crime scene tape and etc.?
[9] **A** It had, yes.
[10] **Q** Do you recall how many police cars were in
[11] that block between Stenton Avenue and where that
[12] apartment building was, if you recall?
[13] **A** How many police cars?
[14] **Q** Yes.
[15] **A** I don't recall. I remember there being at
[16] least one or two cars right at Stenton and Johnson
[17] and I believe another marked car on Johnson Street
[18] south of Stenton.
[19] **Q** Did they have their overhead lights on?
[20] **A** I don't recall.
[21] **Q** The crime scene tape, the police marked
[22] vehicles, looking at C-1 would they have been
[23] readily visible to someone looking out of one of
[24] those windows facing Johnson Street?
[25] **A** I believe they would have been up at

[1] information over police radio.
[2] **Q** So that could be a compilation of
[3] information from any number of sources basically, is
[4] that it?
[5] **A** That's fair to say, yes.
[6] **MR. LORUSSO:** Thank you, Detective. I
[7] have nothing further.
[8] **THE COURT:** You have any redirect?
[9] **MS. FORCHETTI:** I do not.
[10] **THE COURT:** Thank you, sir. You may step
[11] down.
[12] **MS. FORCHETTI:** I would ask at this time
[13] that the photographs be published to the jury.
[14] **THE COURT:** Any objection?
[15] **MR. LORUSSO:** No, Your Honor.
[16] **THE COURT:** All right. Which photographs
[17] are you referring to?
[18] **MS. FORCHETTI:** C-1 C-2, C-4 through C-7
[19] and C-23 through C-27.
[20] ---
[21] (Commonwealth's Exhibits C-1, C-2,
[22] C-4 through C-7 and C-23 through C-27 were
[23] published to the jury.)
[24] ---
[25] **THE COURT:** The aforementioned photographs

[1] Stenton Avenue is not that far out of the view of
[2] this picture. Stenton Avenue would be up the street
[3] here. There would have been a marked police car
[4] here. There was the yellow crime scene tape going
[5] across the driveway. I don't know if that would
[6] have been visible from the windows. I believe there
[7] was another marked car on Johnson Street.
[8] **Q** The information that you testified to
[9] concerning a description that was contained on the
[10] crime scene log is there an indication of where that
[11] information came from?
[12] **A** No, there's not.
[13] **Q** So as we speak today this description that
[14] I think you read of light skin black male, dark
[15] hoodie, skully, with braids, we don't know who gave
[16] that, is that correct?
[17] **A** I don't know who gave that, no.
[18] **Q** There's no indication on the report as to
[19] who the source of that information, is that correct?
[20] **A** No, not on the report, no.
[21] **Q** Anywhere else that you know of?
[22] **A** Just from my experience of filling these
[23] out I know the officer that fills this out would get
[24] the information from various people he may have
[25] talked to or other officers who give him the

[1] may be published.
[2] **MR. LORUSSO:** May we see you at sidebar.
[3] **THE COURT:** Yes.
[4] (Discussion was held off the record.)
[5] **THE COURT:** The photos have been
[6] published.
[7] (Discussion was held off the record.)
[8] **MR. LORUSSO:** If the Court please I would
[9] move to object, move to strike the testimony
[10] presented by Detective Hartman concerning an
[11] identification that he testified to as having
[12] been contained on the crime scene log since
[13] there is no --
[14] **THE COURT:** He didn't testify to an
[15] identification. He testified to a description.
[16] **MR. LORUSSO:** I apologize.
[17] **THE COURT:** If you ask to strike the
[18] description the motion is granted.
[19] **MR. LORUSSO:** I would ask Your Honor to --
[20] **THE COURT:** Disregard the detective's
[21] reference to a description.
[22] **MR. LORUSSO:** Thank you.
[23] **THE COURT:** You may call your next
[24] witness.
[25] **MS. FORCHETTI:** Your Honor, when I last

[1] checked Mr. Kent was not outside.
[2] **THE COURT:** Is that your next witness?
[3] **MS. FORCHETTI:** It is my next witness.
[4] **THE COURT:** Let's take a short recess.
[5] ---
[6] (The jury exited the courtroom at
[7] 10:26 a.m.)
[8] ---
[9] **THE COURT:** Let the record reflect the
[10] jurors left out the room. Who is this Mr.
[11] Kent?
[12] **MS. FORCHETTI:** He's an employee at my
[13] office.
[14] **THE COURT:** Who does he work for?
[15] **MS. FORCHETTI:** My office.
[16] **THE COURT:** It's coming up on 10:30.
[17] We've been here since nine o'clock. To whom
[18] does he report? You can't get an employee of
[19] the district attorney's office over here.
[20] **MS. FORCHETTI:** I told him to be here
[21] bright and early this morning and he text me
[22] back after I talked to him on Friday this
[23] morning saying he would be here by 10:15.
[24] **THE COURT:** That's big of him. It's now
[25] 10:30 and he's not here. Why don't you call

[1] testify to that is if he favors us with his
[2] appearance.
[3] **MS. FORCHETTI:** That he was contacted by
[4] Charles Tolbert and Mr. Tolbert asked to be
[5] relocated and that Mr. Kent did so.
[6] **THE COURT:** Is that it?
[7] **MS. FORCHETTI:** That's pretty much it.
[8] **THE COURT:** All right. Well, you make
[9] your phone call, ma'am. It amazes me that
[10] someone who works for the city, who knows that
[11] we're on trial, can't be here in a timely
[12] manner.
[13] **MS. FORCHETTI:** We had a conversation
[14] about it on Friday. I was under the
[15] understanding he would be here first thing.
[16] **THE COURT:** We have 20 cases on the list.
[17] We have nothing to do but wait for Mr. Kent.
[18] Is that your last witness?
[19] **MS. FORCHETTI:** Yes, Your Honor.
[20] **THE COURT:** Are you going to be ready to
[21] go forward?
[22] **MR. LORUSSO:** Mr. Wright said he would be
[23] here within 15 minutes from now. Then we have
[24] a colloquy I expect of Mr. Simmons.
[25] **THE COURT:** Who does he work for? Call

[1] Mr. Williams or whomever you need to call and
[2] tell him if he's not here within the next five
[3] minutes I'm going to preclude his testimony.
[4] **MR. LORUSSO:** I would have a motion
[5] dealing with precluding his testimony
[6] regardless Your Honor. I believe this is the
[7] offer of proof on that this is the person --
[8] **THE COURT:** What's the offer of proof.
[9] **MS. FORCHETTI:** The offer of proof is Mr.
[10] Kent has constituted relocation proceedings in
[11] this case due to instances of witness
[12] intimidation.
[13] **THE COURT:** You have some background for
[14] that, is there some basis for that, did the
[15] complainant testify that he asked to be
[16] relocated?
[17] **MS. FORCHETTI:** The complainant did
[18] testify about his contact with Mr. Kent that he
[19] did have contact with him and --
[20] **THE COURT:** Did he ask to be relocated?
[21] **MS. FORCHETTI:** I don't know if he
[22] testified to that in this instance but because
[23] he was incooperative at trial but to explain
[24] the demeanor of the complainant.
[25] **THE COURT:** Well, what exactly is going to

[1] his supervisor and tell him he's 15 minutes
[2] late and the judge is on the bench.
[3] **MS. FORCHETTI:** I believe he reports
[4] directly to Mr. Williams.
[5] **THE COURT:** Call Mr. Williams, tell him
[6] that he was supposed to be here and he still
[7] isn't here.
[8] ---
[9] **THE COURT:** Are you ready?
[10] **MS. FORCHETTI:** Yes, Your Honor.
[11] **THE COURT:** Make your offer of proof
[12] again.
[13] **MS. FORCHETTI:** Your Honor, Mr. Kent would
[14] testify that he is an employee of the district
[15] attorney's office. That he is a victim witness
[16] coordinator who handles witnesses who need to
[17] be relocated. He would testify that he was
[18] contacted by Mr. Charles Tolbert in this case
[19] shortly after Mr. Tolbert was shot.
[20] Mr. Tolbert intimated to Mr. Kent that he was
[21] scared and that he requested relocation because
[22] he did live in the neighborhood where he was
[23] shot and felt that the people who shot him knew
[24] where he lived and that Mr. Kent remained in
[25] contact with Mr. Tolbert to relocate

[1] Mr. Tolbert.
[2] **MR. LORUSSO:** Your Honor, I'm not sure
[3] what characterization of intimating that your
[4] scared.
[5] **MS. FORCHETTI:** He said he was scared.
[6] **MR. LORUSSO:** I think Mr. Tolbert has
[7] testified to the contrary that everything was
[8] an attempted money grab.
[9] **THE COURT:** I think it's an issue for the
[10] jury. That goes to his credibility or lack
[11] thereof, does it not?
[12] **MR. LORUSSO:** It does, Your Honor. The
[13] only request that I would make then also is
[14] that if Mr. Kent has any documentation dealing
[15] with this that I be provided with it.
[16] **THE COURT:** If you have documents give
[17] them to the defense now.
[18] **MS. FORCHETTI:** No.
[19] **THE COURT:** I trust that Mr. Kent
[20] appreciates that's the extent of his testimony
[21] there would be no freelancing.
[22] **MS. FORCHETTI:** Yes, Your Honor.
[23] **THE COURT:** You should advise Mr. Kent
[24] that when he tells the Assistant District
[25] Attorney he's going to be in court at 10:15

[1] routine in Montgomery county for instance or a
[2] county or Lackawanna county. I wonder if
[3] anybody cares about the fact that there is a
[4] time certain for trials and we start at
[5] 9:00 o'clock.
[6] **MS. FORCHETTI:** I wouldn't know, Your
[7] Honor.
[8] **THE COURT:** Yes, I'm sure. Philadelphia
[9] is special in that way.
[10] **MR. LORUSSO:** I would have an objection to
[11] the playing of the 911 tape.
[12] **THE COURT:** The two of you would have
[13] listened to the tape together.
[14] **MS. FORCHETTI:** We have listened to the
[15] tape together.
[16] **THE COURT:** What's the basis of playing
[17] the tape?
[18] **MS. FORCHETTI:** Your Honor, I think the
[19] relevant portions were already played for the
[20] jury.
[21] **THE COURT:** Your objection is sustained.
[22] - - -
[23] (The jury entered the courtroom at
[24] 10:41 a.m.)
[25] - - -

[1] typically the Assistant District Attorney tells
[2] that to the judge and the judge relies on it.
[3] **MS. FORCHETTI:** Yes, Your Honor.
[4] **THE COURT:** We had to lose half an hour to
[5] wait for Mr. Kent to get here and as I
[6] understand it he's a paid representative of
[7] your office.
[8] **MS. FORCHETTI:** Correct.
[9] **THE COURT:** I'm not pleased with that.
[10] **MS. FORCHETTI:** Yes, Your Honor.
[11] **THE COURT:** Bring the jury out. Who do
[12] you have after Mr. Kent?
[13] **MS. FORCHETTI:** I have the medical
[14] records. I have the certificate of
[15] non-licensure. Counsel and I had asked playing
[16] the 911 footage for the jury which lasts
[17] approximately 28 minutes.
[18] **THE COURT:** Then you rest?
[19] **MS. FORCHETTI:** Then I would rest.
[20] **THE COURT:** You'll be ready after that?
[21] **MR. LORUSSO:** Yes, Your Honor.
[22] **THE COURT:** I wonder how many other
[23] jurisdictions with judges just sit around and
[24] wait on employees of the district attorney's
[25] office to show up. I wonder if that's the

[1] **THE COURT:** You may continue your case.
[2] **MS. FORCHETTI:** Thank you, Your Honor.
[3] Your Honor, at this time the Commonwealth calls
[4] Mr. Leland Kent.
[5] **COURT CRIER:** State your full name, spell
[6] your last name, and current assignment.
[7] **THE WITNESS:** Leland Kent; L-E-L-A-N-D
[8] K-E-N-T. I'm the executive director of Victims
[9] Services and Community Outreach.
[10] - - -
[11] LELAND KENT, after having been duly
[12] sworn, was examined and testified as follows:
[13] - - -
[14] DIRECT EXAMINATION
[15] - - -
[16] **BY MS. FORCHETTI:**
[17] **Q** Good morning, Mr. Kent. Mr. Kent, how are
[18] you employed?
[19] **A** Currently employed by the District
[20] Attorney's Office as the Executive Director of
[21] Victim Services.
[22] **Q** For how long have you been employed with
[23] the District Attorney's office?
[24] **A** For 17 years.
[25] **Q** Have you always worked with victims?

[1] A Yes.
[2] Q What do your duties entail over at the
[3] District Attorney's Office?
[4] A My main responsibility is aiding and
[5] assisting witnesses who are being intimidated and
[6] relocating them.
[7] Q Were you contacted by a Mr. Charles
[8] Tolbert in reference to this case?
[9] A I was.
[10] Q When was that?
[11] A February 22, 2011 from Albert Einstein
[12] Hospital.
[13] Q How was Mr. Tolbert when he contacted you,
[14] what was his demeanor?
[15] A He was scared. He was a shooting victim
[16] and he was requesting assistance with relocation.
[17] Q Did you assist him?
[18] A I interviewed him for relocation
[19] assistance and we provided him a safety plan and we
[20] did assist him.
[21] Q Why is it necessary to interview someone
[22] who states that they want assistance from the
[23] District Attorney's Office?
[24] A Well, the interviewing process is we go
[25] through a memorandum of understanding which outlines

[1] A We provided no financial assistance to
[2] Mr. Tolbert.
[3] Q Why not?
[4] A Mr. Tolbert was staying with a friend and
[5] the process for assisting Mr. Tolbert was for him to
[6] find a place of his choice and we would pay six
[7] months rent up front for him. Mr. Tolbert continued
[8] to stay with a friend and never found a place to
[9] move separate from the friend.
[10] Q Before Mr. Tolbert contacted you did you
[11] have any knowledge of this case?
[12] A No.
[13] Q When you discuss a safety and relocation
[14] plan with a witness do you discuss their testimony
[15] with the witness?
[16] A We do not. I do not.
[17] Q You don't get involved in that part of the
[18] case?
[19] A My only role would be to assist him in
[20] relocating.
[21] Q Mr. Kent, you relocate just any witness
[22] who says they want to be relocated?
[23] A No. We only relocate families who are in
[24] imminent danger. Imminent meaning if we don't do
[25] anything more than likely something is going to

[1] what we can do, what the victim or witness can
[2] expect from us, and what we expect from them. So it
[3] clearly outlines the parameters of the program.
[4] Q Was Mr. Tolbert cooperative with this
[5] process?
[6] A He was very cooperative.
[7] Q When was the last time you had contact
[8] with Mr. Tolbert?
[9] A May of 2011.
[10] Q From February until May was Mr. Tolbert
[11] cooperative with the process?
[12] A Yes.
[13] Q What happened in May of 2011?
[14] A He was staying with a friend outside the
[15] danger area and that was his safety plan.
[16] Q Did there come a time when the District
[17] Attorney's Office no longer needed to house
[18] Mr. Tolbert?
[19] A He was staying with a friend. We were not
[20] housing him.
[21] Q Did there become a time where you were
[22] aware that Mr. Tolbert was no longer staying with
[23] that friend?
[24] A No.
[25] Q Did you give Mr. Tolbert any money?

[1] happen to them.
[2] MR. LORUSSO: Objection. Move to strike.
[3] THE COURT: Motion granted. You will
[4] disregard that, ladies and gentlemen. You have
[5] any other questions?
[6] MS. FORCHETTI: No, Your Honor.
[7] THE COURT: You have cross-examination.
[8] - - -
[9] CROSS-EXAMINATION
[10] - - -
[11] BY MR. LORUSSO:
[12] Q Mr. Kent, you said that February 22nd is
[13] when you receive a phone call from Mr. Tolbert,
[14] correct?
[15] A That's correct, sir.
[16] Q Do you have any documentation with regard
[17] to the contact between your office and Mr. Tolbert?
[18] A We have a interview sheet and I have a
[19] referral sheet from the district attorney Stacey
[20] Forchetti requesting relocation services.
[21] Q Do you have that with you today?
[22] A I do not have it with me today.
[23] Q Do you have a document dealing with the
[24] interview of Mr. Tolbert?
[25] A Yes, sir.

[1] **Q** Do you have that with you today?
[2] **A** No, I do not.
[3] **Q** Did you review that information before
[4] testifying here today?
[5] **A** Yes, I did.
[6] **Q** Was it some reason you thought it not
[7] appropriate to bring that information to court with
[8] you today?
[9] **A** Our information in regards to witness
[10] relocation is not discoverable as far as to be
[11] handed over. We hand over how much financial or
[12] money that we spend on witnesses but in regards to
[13] internal documents I generally do not bring that to
[14] court.
[15] **Q** How about when you testify in cases, you
[16] still don't bring it to court?
[17] **A** When I testify in cases I will have notes
[18] where as though the date that we interviewed a
[19] witness. However, any internal documents are not
[20] brought to court or taken out of the district
[21] attorney's office for the safety of the witness that
[22] we're assisting.
[23] **MR. LORUSSO:** I'd ask the Court to
[24] instruct the witness to provide the
[25] documentation.

[1] be in harms way including a personal close
[2] relatives of the witness in this case or all
[3] cases.
[4] **BY MS. FORCHETTI:**
[5] **Q** So you typically do not provide that
[6] information to defense, is that correct?
[7] **A** We do not. We typically dispose how much
[8] money we spent, what the purposes of the money
[9] spent, whether that's for lodging, whether that's
[10] for moving expenses, paying for a mover, security
[11] deposit. All of these expenses are itemized and
[12] shared with the defense prior to a trial. In this
[13] particular case there was no money spent. There was
[14] simply victim services with a safety plan coming up
[15] that we provided the witness to stay with a friend
[16] in which he chose that was the method that he chose.
[17] **MS. FORCHETTI:** Thank you, Mr. Kent.
[18] **MR. LORUSSO:** I have no recross.
[19] **THE COURT:** You may step down.
[20] (Witness excused.)
[21] **THE COURT:** You may continue.
[22] **MS. FORCHETTI:** Your Honor, Mr. Kent was
[23] my last live witness.
[24] **THE COURT:** May I see you at sidebar.
[25] (Discussion was held off the record.)

[1] **THE COURT:** On what basis do you need
[2] that?
[3] **MR. LORUSSO:** To see what it is the
[4] representations made by this witness concerning
[5] Mr. Tolbert's outreach and to determine whether
[6] or not the documents support that.
[7] **MS. FORCHETTI:** Your Honor --
[8] **THE COURT:** Finish your cross-examination.
[9] **MR. LORUSSO:** I have nothing further.
[10] **THE COURT:** Do you have any redirect?
[11] ---
[12] REDIRECT EXAMINATION
[13] ---
[14] **BY MS. FORCHETTI:**
[15] **Q** Mr. Kent, why is that information not
[16] discoverable?
[17] **A** Information has a lot of personal
[18] information --
[19] **MR. LORUSSO:** Objection to this witness
[20] giving an opinion as to what under the law is
[21] discoverable.
[22] **THE COURT:** Overruled.
[23] **THE WITNESS:** Information has a lot of
[24] personal information including family members
[25] that may be still in the neighborhood who would

[1] **THE COURT:** Please continue.
[2] **MS. FORCHETTI:** Your Honor, there's been a
[3] stipulation by and between counsel concerning
[4] the medical records in this case.
[5] **THE COURT:** Very well. Ladies and
[6] gentlemen, you will recall that in my
[7] preliminary instructions I told you that
[8] statements made by the attorneys did not
[9] constitute evidence and therefore they were not
[10] binding on you. Well, there are exceptions to
[11] that rule and a stipulation is one such
[12] exception. The law is that when the
[13] Commonwealth and the defense stipulate, that is
[14] when they agree that certain facts are true
[15] then their stipulation is evidence of those
[16] facts and you, ladies and gentlemen, should
[17] regard stipulated or agreed upon facts as
[18] proven. You may offer your stipulation.
[19] **MS. FORCHETTI:** Thank you, Your Honor.
[20] Good morning, ladies and gentlemen of the jury.
[21] There's been an agreement by and between
[22] counsel, Mr. Lorusso and I, that were Dr. Mark
[23] Kaplan were called in to testify he would tell
[24] you that he was the attending physician at
[25] Albert Einstein Medical Center on February 4,

[1] 2011 at which time at 2:25 in the afternoon a
[2] Mr. Charles Tolbert was admitted. He was
[3] diagnosed as a level one trauma. Several
[4] gunshot wounds were observed. Mr. Tolbert he
[5] immediately went in for emergent exploratory
[6] laparotomy. There was a small bowel resection
[7] performed on him as well in three separate
[8] places. There was a partial rectal resection
[9] of Mr. Tolbert. And a partial splenic flexure
[10] resection. He underwent those surgeries on
[11] February 4, 2011 and remained in intubated and
[12] sedated condition on that day.

[13] On February 4th at 14:55, at 2:55 in the
[14] afternoon there was a small bullet like
[15] material that was recovered from Mr. Tolbert
[16] and turned over to the Philadelphia police. At
[17] that time there were also 38 bags of a green
[18] leafy substance that was turned over to the
[19] police.

[20] On February 5th there was another
[21] exploratory laparotomy performed on him. There
[22] was a removal of packing from his abdominal
[23] cavity. A left colectomy was performed as well
[24] as a transverse colostomy. In two separate
[25] parts of his abdomen there was a Reanastomosis

[1] Your Honor, that is a brief summary of the
[2] close to 2000 pages of medical records which
[3] the Commonwealth would mark as Commonwealth's
[4] Exhibit 29.

[5] **THE COURT:** So stipulated, Mr. Lorusso?

[6] **MR. LORUSSO:** It is so stipulated.

[7] **THE COURT:** Records will be marked as
[8] Commonwealth's Exhibit 29. You may continue.

[9] **MS. FORCHETTI:** Your Honor, the
[10] Commonwealth would next mark as Commonwealth's
[11] Exhibit 30 the certificate of non-licensure,
[12] showing that this defendant Johnnie Simmons who
[13] gave an address of 1528 East Johnson Street in
[14] the city and county of Philadelphia with a date
[15] of birth of March 15, 1991, did not have a
[16] license to carry a firearm nor did he have a
[17] valid sportsman permit or a hunters permit.
[18] That document was prepared by the commissioner
[19] of Pennsylvania state police custodian of
[20] records a Colonel Frank Newman.

[21] **THE COURT:** That will be accepted. You
[22] have any objection?

[23] **MR. LORUSSO:** No, Your Honor.

[24] **MS. FORCHETTI:** We would ask that this be
[25] marked C-30.

[1] performed and his abdominal wall was closed.
[2] He was remained in guarded and intubated
[3] condition.

[4] As a result of several x-rays and CAT
[5] scans he was observed to have a bullet lodged
[6] in his medial left gluteus muscle. He was also
[7] observed to have a comminuted fracture of the
[8] distal sacrum or the proximum coccyx that was
[9] medial to the bullet wound. There was another
[10] bullet found lodged in his superficial back
[11] soft tissues. And there was a bullet fragment
[12] overlying the heart. He was observed to have
[13] gunshot wounds in his left anterior chest, two
[14] gunshot wounds to his right upper arm, and a
[15] gunshot wound to his abdomen. He remained
[16] taking nothing by mouth until February 11, 2011
[17] at which time he was permitted to ingest clear
[18] liquids. He was diagnosed as having acute
[19] stress disorder and antisocial personality
[20] disorder. And he was observed to be in police
[21] custody while he was in the SICU. He was
[22] discharged from Albert Einstein Medical Center
[23] on February 22, 2011 at which time a visiting
[24] nurse was prescribed to care for his wounds and
[25] dressings as he still had open wounds.

[1] **THE COURT:** It will be marked as C-30.

[2] - - -

[3] (Commonwealth's Exhibits 29 and 30
[4] were marked for identification.)

[5] - - -

[6] **MS. FORCHETTI:** Your Honor, at this time
[7] the Commonwealth would seek to mark C-1 through
[8] C-30 -- I'm sorry. I would also like to mark
[9] the 911 footage that was played for the jury
[10] the portion of which that related to Mr. Kyle
[11] Holman's car. I would seek to mark that as
[12] Commonwealth's Exhibit 31.

[13] **THE COURT:** It's been received.

[14] - - -

[15] (Commonwealth's Exhibit 31 was marked
[16] for identification.)

[17] - - -

[18] **MS. FORCHETTI:** At which time the
[19] Commonwealth will now rest.

[20] **THE COURT:** You move in admission of C-1
[21] through C-31?

[22] **CW. ATTY.:** Correct.

[23] **THE COURT:** It will be received.
[24] Commonwealth having rested we'll take another
[25] short recess.

[1] ---
[2] (The jury exited the courtroom at
[3] 10:58 a.m.)
[4] ---
[5] **THE COURT:** Let the record also reflect
[6] the jurors have left the room. Mr. Lorusso,
[7] the Commonwealth having rested what is your
[8] pleasure?
[9] **MR. LORUSSO:** I make the motion for
[10] judgment of acquittal as to all charges.
[11] **THE COURT:** Any argument?
[12] **MR. LORUSSO:** No, Your Honor.
[13] **THE COURT:** Motion denied.
[14] **MR. LORUSSO:** Thank you. I would like to
[15] see whether Mr. Wright has arrived yet. If not
[16] I would ask that at least initially if the
[17] court intends to colloquy Mr. Simmons with
[18] regard to his testimony that we do that and if
[19] Mr. Wright hasn't arrived I'll rest after the
[20] admission of one stipulation.
[21] **THE COURT:** You were asked at sidebar to
[22] have the record of Mr. Kent, I don't know if
[23] there's any real need for those, but I've
[24] directed the Assistant District Attorney to
[25] have Mr. Kent produce those records. I'll

[1] **MR. LORUSSO:** I don't know whether there
[2] were any notes that would contradict the
[3] characterization that this jury has of
[4] Mr. Tolbert being intimidated or fearful.
[5] **THE COURT:** Mr. Tolbert testified that he
[6] asked to be relocated.
[7] **MR. LORUSSO:** I appreciate that. I would
[8] only ask and I have no objection at all, when
[9] these records eventually get here with the
[10] court's permission assuming they would get here
[11] before we get to the jury.
[12] **THE COURT:** Who knows. I have no idea.
[13] **MR. LORUSSO:** I don't want to hold the
[14] court up right now. So with your permission I
[15] have no problem proceeding and in the event
[16] that there is anything that would suggest I
[17] should proceed on that then as long as I can do
[18] that if there is nothing --
[19] **THE COURT:** Is your witness here?
[20] **MR. LORUSSO:** Yes. That witness will be
[21] very brief, I would think.
[22] **THE COURT:** Can you see if Mr. Kent is
[23] going to come back any time soon?
[24] **MS. FORCHETTI:** Yes. I'll reach out to
[25] him, Your Honor.

[1] review them and make a determination as to
[2] whether or not they're discoverable.
[3] **MS. FORCHETTI:** Your Honor, I do have the
[4] relocation memo that I prepared but I would
[5] submit that that is an attorney work product,
[6] it's an internal document.
[7] **THE COURT:** Where is Mr. Kent?
[8] **MS. FORCHETTI:** I don't know. I haven't
[9] left this courtroom.
[10] **THE COURT:** Does he have the records or
[11] not?
[12] **MS. FORCHETTI:** I informed him to go back
[13] to the office to get the document that he used
[14] and he did that.
[15] **THE COURT:** Let's take a short recess
[16] until he gets back. It might be this month, it
[17] might be next month.
[18] (Short recess taken.)
[19] **THE COURT:** This is the case of
[20] Commonwealth versus Simmons. You heard Mr.
[21] Kent testify. What is it that you expect to
[22] find in the records that would further the
[23] inquiry as to whether or not the man asked to
[24] be relocated and he was put up with a friend
[25] and that was the beginning and the end of it.

[1] **MR. LORUSSO:** Will we address the charges
[2] beforehand?
[3] **THE COURT:** Yes. Let the record reflect
[4] the two young men were asked to leave because
[5] they were disrupting the court, laughing.
[6] There's also no sleeping in the courtroom. If
[7] you want to sleep, go outside. That's you,
[8] sir. Finish your nap outside.
[9] Do you know where Mr. Kent is right now?
[10] **MS. FORCHETTI:** I did attempt to contact
[11] him. I haven't heard back.
[12] **THE COURT:** Did he answer when you called
[13] him?
[14] **MS. FORCHETTI:** He did not. That was
[15] seven minutes ago.
[16] **THE COURT:** Does he have a number in his
[17] office?
[18] **MS. FORCHETTI:** Yes. He has an office
[19] line.
[20] **THE COURT:** Could you call his office
[21] line?
[22] Does he have a sergeant?
[23] **MS. FORCHETTI:** There's a unit secretary.
[24] **THE COURT:** Did anybody answer the phone?
[25] **MS. FORCHETTI:** No, Your Honor.

[1] (Recess taken.)
[2] **THE COURT:** We're still waiting for Mr.
[3] Kent?
[4] **MS. FORCHETTI:** I received a message from
[5] him that he is on his way up. Your Honor,
[6] there are other things that we can do.
[7] **THE COURT:** I'd like to finish with this.
[8] We have been consumed with Mr. Kent from 10:15
[9] when he did not appear. Now it's a quarter to
[10] 12:00 and we're waiting for him again. You
[11] think that's the way it should be?
[12] **MS. FORCHETTI:** No, Your Honor.
[13] **THE COURT:** You have the file?
[14] **MS. FORCHETTI:** No, Your Honor, I do not.
[15] **THE COURT:** Why not?
[16] **MS. FORCHETTI:** Mr. Kent was unable to
[17] find it.
[18] **THE COURT:** All right. We are back on the
[19] record Mr. Simmons is here in the courtroom
[20] with his attorney Mr. Lorusso and Ms. Forchetti
[21] for the Commonwealth. Before we recessed this
[22] last time it was my understanding that Mr. Kent
[23] was going to produce his file in this case.
[24] I'll hear from you.
[25] **MS. FORCHETTI:** Your Honor, Mr. Kent after

[1] information that was fresh on Mr. Kent's mind
[2] because he was very specific in terms of the
[3] dates involved or the date he first spoke with
[4] Mr. Tolbert, the circumstances of the
[5] relocation, and at what point in time it was in
[6] May of 2011 when there was no further contact
[7] with him.
[8] **MS. FORCHETTI:** Your Honor, it's clear
[9] that Mr. Kent testified from his own memory
[10] from his own personal contact with Mr. Charles
[11] Tolbert. There would be no legal basis for
[12] striking Mr. Kent's testimony. It's averred
[13] that the information contained within
[14] Mr. Kent's file would contain both attorney
[15] work product and sensitive information that
[16] would not be discoverable to defense counsel
[17] anyway. So it's somewhat of a moot point to
[18] ask that the testimony be stricken based on
[19] information that cannot be provided at this
[20] time.
[21] **THE COURT:** Mr. Lorusso, your motion to
[22] strike is denied. However, if you wish to call
[23] Mr. Kent as your witness and have him testify
[24] to this jury that the file has gone missing
[25] that's entirely up to you.

[1] he concluded his testimony upon your request
[2] went back to his office to attempt to locate
[3] the file. He had a binder with him in court on
[4] the witness stand when this case was last
[5] heard, other detectives recall seeing him with
[6] the binder, recall seeing it in the anteroom
[7] adjacent to courtroom 802. They seem to recall
[8] Mr. Kent leaving when he went to interview with
[9] Mr. Kyle Holman that he took the binder with
[10] him. He did do additional work in connection
[11] with this case with respect to Mr. Holman and
[12] recalls using the file at that time. At this
[13] time he is unable to locate his file. That is
[14] the extent of my conversation with him in the
[15] brief amount of time I saw him just now outside
[16] of courtroom 802. Mr. Kent is present in the
[17] room.
[18] **THE COURT:** Mr. Lorusso.
[19] **MR. LORUSSO:** Under the circumstances I
[20] would ask Your Honor to strike Mr. Kent's
[21] testimony and instruct the jury to disregard
[22] it. I have no opportunity or basis to inquire
[23] concerning the characterization that he made of
[24] Mr. Tolbert's demeanor. And obviously there is
[25] information in that vane and obviously it was

[1] **MR. LORUSSO:** Thank you. I would ask that
[2] he remain and I would probably do that.
[3] **THE COURT:** Is there anything else in your
[4] case?
[5] **MS. FORCHETTI:** No, Your Honor. I rest.
[6] **THE COURT:** Are you ready to proceed?
[7] **MR. LORUSSO:** I am, Your Honor.
[8] **THE COURT:** All right. Who will be your
[9] first witness?
[10] **MR. LORUSSO:** I'll call -- I would ask
[11] that Mr. Kent be asked to remain.
[12] **MS. FORCHETTI:** I will do so.
[13] **MR. LORUSSO:** Actually I'll call Mr. Kent
[14] as my first witness.
[15] **THE COURT:** Before the jury is brought
[16] back Mr. Lorusso how will you be proceeding.
[17] **MR. LORUSSO:** I'll call Mr. Kent briefly,
[18] Mr. Ingram. I will call him to testify
[19] concerning the embrace in the hallway.
[20] **THE COURT:** Who is Mr. Ingram?
[21] **MS. FORCHETTI:** He's thinking of the
[22] defense attorney.
[23] **MR. LORUSSO:** I'm sorry. Mr. Wright.
[24] Mr. Simmons has indicated that he will elect
[25] not to testify.

[1] **THE COURT:** Swear in Mr. Simmons again.
[2] **COURT CRIER:** State your full name and
[3] spell your last name.
[4] **THE DEFENDANT:** Johnnie Simmons,
[5] S-I-M-M-O-N-S.
[6] - - -
[7] JOHNNIE SIMMONS, after having been
[8] duly sworn, was examined and testified as
[9] follows:
[10] - - -
[11] **THE COURT:** Tell us your full name again,
[12] sir.
[13] **THE DEFENDANT:** Johnnie Simmons.
[14] **THE COURT:** How old are you?
[15] **THE DEFENDANT:** Twenty.
[16] **THE COURT:** What is your date of birth?
[17] **THE DEFENDANT:** March 15, 1991.
[18] **THE COURT:** How far did you go in school?
[19] **THE DEFENDANT:** Ninth grade.
[20] **THE COURT:** Where?
[21] **THE DEFENDANT:** King High School.
[22] **THE COURT:** Do you read, write, and
[23] understand English?
[24] **THE DEFENDANT:** Yes.
[25] **THE COURT:** Have you ever been diagnosed

[1] **THE DEFENDANT:** Yes.
[2] **THE COURT:** You may, if you wish, invoke
[3] your right of silence and in effect if the
[4] Commonwealth brought these charges were proven
[5] and not testify, is that clear to you?
[6] **THE DEFENDANT:** Yes.
[7] **THE COURT:** You have a constitutional
[8] right of silence; is that clear?
[9] **THE DEFENDANT:** Yes.
[10] **THE COURT:** On the other hand, you as a
[11] defendant in a criminal case is afforded an
[12] absolute right to testify; do you understand
[13] that?
[14] **THE DEFENDANT:** Yes.
[15] **THE COURT:** You have a right to testify,
[16] you have a right to subpoena, call witnesses.
[17] You have a right to present any defense
[18] justification or excuse, do you understand?
[19] **THE DEFENDANT:** Yes.
[20] **THE COURT:** Whether or not you testify is
[21] entirely up to you. It's your decision and
[22] yours alone, do you understand that?
[23] **THE DEFENDANT:** Yes.
[24] **THE COURT:** Now, do you understand your
[25] rights?

[1] or treated for a mental illness or disease?
[2] **THE DEFENDANT:** No.
[3] **THE COURT:** Are you now under the
[4] influence of drugs, alcohol, or medication?
[5] **THE DEFENDANT:** No.
[6] **THE COURT:** Mr. Simmons, your attorney has
[7] advised me on the record that it is your
[8] decision to invoke your right of silence and
[9] not testify in this case; is that right?
[10] **THE DEFENDANT:** Yes.
[11] **THE COURT:** I'm advised to conduct this
[12] colloquy which is nothing more than a
[13] conversation so that I can make a decision on
[14] the record whether or not this is your decision
[15] made knowingly, intelligently, and voluntarily;
[16] do you understand that?
[17] **THE DEFENDANT:** Yes.
[18] **THE COURT:** First order of business is to
[19] **tell you the following:** Every defendant has a
[20] right against self-incrimination. The
[21] defendant in a criminal case is presumed
[22] innocent. It's the Commonwealth burden of
[23] proof to prove guilt beyond a reasonable doubt.
[24] So a defendant has no obligation to testify; do
[25] you understand that?

[1] **THE DEFENDANT:** Yes.
[2] **THE COURT:** You understand on the one hand
[3] you have no obligation to testify and indeed
[4] have been afforded a constitutional privilege
[5] against self-incrimination which allows you to
[6] invoke your right of silence at trial?
[7] **THE DEFENDANT:** Yes.
[8] **THE COURT:** On the other hand do you
[9] understand that you have an absolute right to
[10] testify, a right founded upon our constitution?
[11] **THE DEFENDANT:** Yes.
[12] **THE COURT:** Have you discussed this with
[13] your attorney?
[14] **THE DEFENDANT:** Yes.
[15] **THE COURT:** Do you understand, however,
[16] that it's not his decision, it's yours and
[17] yours alone, is that clear to you?
[18] **THE DEFENDANT:** Yes.
[19] **THE COURT:** Have you thought about this?
[20] **THE DEFENDANT:** Yes.
[21] **THE COURT:** After thinking about it have
[22] you made a decision?
[23] **THE DEFENDANT:** Yes.
[24] **THE COURT:** What is your decision?
[25] **THE DEFENDANT:** I don't want to testify.

[1] **THE COURT:** I do not want to testify or I
[2] want to testify?
[3] **THE DEFENDANT:** I do not.
[4] **THE COURT:** Say it clearly and distinctly.
[5] You want to testify or I do not want to?
[6] **THE DEFENDANT:** I do not want to testify.
[7] **THE COURT:** Was that your decision?
[8] **THE DEFENDANT:** Yes.
[9] **THE COURT:** Is it yours alone?
[10] **THE DEFENDANT:** Yes.
[11] **THE COURT:** Did anyone promise you
[12] anything, threaten you, or force you to make
[13] this decision?
[14] **THE DEFENDANT:** No.
[15] **THE COURT:** You understand that it makes
[16] perfect sense to discuss these matters with
[17] your attorney?
[18] **THE DEFENDANT:** Yes.
[19] **THE COURT:** Have you discussed it with
[20] him?
[21] **THE DEFENDANT:** Yes.
[22] **THE COURT:** Having discussed it with him
[23] have you concluded that you wish not to
[24] testify?
[25] **THE DEFENDANT:** Yes.

[1] instruction into the record so that your client
[2] hears it and you hear it. I want you to
[3] discuss it with him and tell me whether or not
[4] he wishes me to give this instruction.
[5] Mr. Simmons, you may if you wish, have the
[6] court give the following instruction. It
[7] **reads:** It is entirely up to the defendant in
[8] every case whether or not to testify. He has
[9] an absolute right founded on the Constitution
[10] to remain silent. You must not draw any
[11] inference of guilt or any other inference
[12] adverse to the defendant to the fact he did not
[13] testify. Did you hear that?
[14] **THE DEFENDANT:** Yes.
[15] **THE COURT:** Did you understand those
[16] words?
[17] **THE DEFENDANT:** Yes.
[18] **THE COURT:** Mr. Lorusso, would you
[19] discuss.
[20] (Discussion was held off the record.)
[21] **MR. LORUSSO:** I've discussed it with
[22] Mr. Simmons, Your Honor.
[23] **THE COURT:** What's his decision?
[24] **MR. LORUSSO:** His decision is for Your
[25] Honor to instruct the jury in that manner.

[1] **THE COURT:** All right. Did anyone promise
[2] you anything, threaten you, or your force you
[3] to make this decision?
[4] **THE DEFENDANT:** No.
[5] **THE COURT:** Is it yours?
[6] **THE DEFENDANT:** Yes.
[7] **THE COURT:** Did you make it of your own
[8] free will?
[9] **THE DEFENDANT:** Yes.
[10] **THE COURT:** Did you discuss it with your
[11] attorney?
[12] **THE DEFENDANT:** Yes.
[13] **THE COURT:** Are you satisfied with his
[14] service?
[15] **THE DEFENDANT:** Yes.
[16] **THE COURT:** Let the record reflect the
[17] court finds that the defendant has knowingly,
[18] intelligently, and voluntarily invoked his
[19] right to silence and he will not be testifying.
[20] Mr. Lorusso, it is my practice in cases
[21] such as this to ascertain from you whether or
[22] not the defendant wishes me to give the no
[23] adverse inference charge at the appropriate
[24] time. Once again, this is the defendant's
[25] decision. I'm going to read the standard

[1] **THE COURT:** Did you hear what your
[2] attorney is asking?
[3] **THE DEFENDANT:** Yes.
[4] **THE COURT:** He has advised me that you
[5] wish me to give this instruction, is that
[6] correct?
[7] **THE DEFENDANT:** Yes.
[8] **THE COURT:** Is he correct when he tells me
[9] that's your decision?
[10] **THE DEFENDANT:** Yes.
[11] **THE COURT:** Is it your decision?
[12] **THE DEFENDANT:** Yes.
[13] **THE COURT:** Did you make it of your own
[14] free will?
[15] **THE DEFENDANT:** Yes.
[16] **THE COURT:** Did anyone threaten you,
[17] promise you anything, or force you to make this
[18] decision?
[19] **THE DEFENDANT:** No.
[20] **THE COURT:** You discussed this with your
[21] attorney?
[22] **THE DEFENDANT:** Yes.
[23] **THE COURT:** You satisfied with his
[24] services?
[25] **THE DEFENDANT:** Yes.

[1] **THE COURT:** Mr. Lorusso has advised me
[2] that he will be calling on your behalf Mr. Kent
[3] and Mr. Wright. He then will be resting, is
[4] that a fair statement?
[5] **MR. LORUSSO:** And a stipulation, Your
[6] Honor.
[7] **THE COURT:** What's the stipulation?
[8] **MR. LORUSSO:** The stipulation is between
[9] counsel that the letter of Charles Tolbert
[10] marked exhibit C-12 was provided to the
[11] Assistant District Attorney by myself.
[12] **THE COURT:** Did you hear what he said,
[13] Mr. Simmons?
[14] **THE DEFENDANT:** Yes.
[15] **THE COURT:** Your attorney advised me that
[16] he will offer up the formal stipulation, he
[17] will call Mr. Wright and call Mr. Kent and then
[18] he will rest his case. Are you in agreement
[19] that's how you should proceed?
[20] **THE DEFENDANT:** Yes.
[21] **THE COURT:** Are there any other witnesses
[22] you wish to call?
[23] **THE DEFENDANT:** No.
[24] **THE COURT:** All right. Let's finish the
[25] case then. Bring the jurors out.

[1] by the Court to produce your file?
[2] **A** That is correct.
[3] **Q** Have you been able to do that?
[4] **A** No.
[5] **Q** When did you last see your file?
[6] **A** Last Wednesday in the prep room right
[7] outside of 802.
[8] **Q** Do I understand that you haven't seen it
[9] since then?
[10] **A** That's correct?
[11] **MR. LORUSSO:** Thank you. I have nothing
[12] further.
[13] **THE COURT:** Cross-examine.
[14] ---
[15] CROSS-EXAMINATION
[16] ---
[17] **BY MS. FORCHETTI:**
[18] **Q** Mr. Kent, when were you asked to obtain
[19] this file and bring it to court?
[20] **A** Today maybe an hour and a half ago.
[21] **Q** When is the last time you did work on this
[22] file that you added to it?
[23] **A** In May of this year, 2011.
[24] **Q** Were you here last Wednesday prepared to
[25] testify?

[1] ---
[2] (The jury entered the courtroom at
[3] 12:02 p.m.)
[4] ---
[5] **THE COURT:** Mr. Lorusso, the Commonwealth
[6] having rested you may proceed.
[7] **MR. LORUSSO:** Thank you. With the Court's
[8] permission we call Mr. Leland Kent.
[9] **COURT CRIER:** State your full name and
[10] spell your last name.
[11] **THE WITNESS:** Leland Kent, K-E-N-T,
[12] executive director of victim services.
[13] ---
[14] LELAND KENT, after having been duly
[15] sworn, was examined and testified as follows:
[16] ---
[17] DEFENSE EVIDENCE
[18] DIRECT EXAMINATION
[19] ---
[20] **BY MR. LORUSSO:**
[21] **Q** Mr. Kent, you have indicated previously
[22] that you did not have your file with you concerning
[23] Charles Tolbert, is that correct?
[24] **A** That is correct.
[25] **Q** Subsequent to testifying were you ordered

[1] **A** Yes.
[2] **Q** But we didn't get to you on Wednesday; is
[3] that right?
[4] **A** That's correct.
[5] **Q** Did you return to the office at the
[6] conclusion of the court day?
[7] **A** Yes.
[8] **Q** Were you involved in relocating a witness
[9] at the conclusion of the court day?
[10] **A** Yes.
[11] **Q** Was that an unexpected event?
[12] **A** Yes.
[13] **Q** Did you, in fact, forget your umbrella
[14] when you left this courtroom?
[15] **A** That is correct.
[16] **Q** I returned it to you?
[17] **A** That's correct.
[18] **Q** Are you hiding this file from the defense?
[19] **A** No.
[20] **Q** The file contains the contents of your
[21] conversations with the witnesses involved in this
[22] case; is that right?
[23] **A** Yes; the interview.
[24] **Q** Did you testify today from your own
[25] memory?

[1] **A** That's correct.
[2] **Q** Did you have any notes in front of you
[3] when you testified?
[4] **A** No.
[5] **Q** So you remember Mr. Tolbert fairly well?
[6] **A** I do.
[7] **Q** How many conversations would you say you
[8] had with Mr. Tolbert during the course of this case?
[9] **A** Many. From February through May we would
[10] talk three or four times a week.
[11] **Q** That is how you were able to remember him,
[12] the specificity?
[13] **A** That's correct.
[14] **MS. FORCHETTI**: Thank you. I have nothing
[15] further.
[16] **THE COURT**: Thank you, Mr. Kent.
[17] **MR. LORUSSO**: I have one more.
[18] ---
[19] REDIRECT EXAMINATION
[20] ---
[21] **BY MR. LORUSSO**:
[22] **Q** Mr. Kent, the witness that you helped to
[23] relocate on Wednesday after leaving here I assume
[24] had nothing to do with this prosecution?
[25] **A** I'm sorry.

[1] **A** Yes. I recall receiving a memo from
[2] Stacey Forchetti once I notified her that
[3] Mr. Tolbert called me requesting relocation services
[4] and that's the date that the memo that Ms. Forchetti
[5] provided me approved by her chief and deputy to
[6] approve for witness relocation assistance. So I
[7] recall that based on the date of the memo that was
[8] given to me.
[9] **Q** That's a memo that you had a chance to
[10] look at before you testified, is that correct?
[11] **A** Yes.
[12] **MR. LORUSSO**: Thank you.
[13] **THE COURT**: Anything else?
[14] **MS. FORCHETTI**: No.
[15] **THE COURT**: You may step down.
[16] (Witness excused.)
[17] **THE COURT**: Call your next witness.
[18] **MR. LORUSSO**: Gerald Wright.
[19] **COURT CRIER**: State your full name and
[20] spell your last name.
[21] **THE WITNESS**: Gerald Wright, W-R-I-G-H-T.
[22] ---
[23] GERALD WRIGHT, after having been duly
[24] sworn, was examined and testified as follows:
[25]

[1] **Q** You were asked a question I guess in your
[2] hurried state of mind to get out of here where you
[3] left your umbrella and you last saw your file you
[4] said you were in response to a question helping to
[5] relocate a witness, is that right, it was a sudden
[6] event?
[7] **A** It was.
[8] **Q** Had nothing to do with this case, is that
[9] right?
[10] **A** That's not correct.
[11] **Q** You were attempting to relocate a witness
[12] with regard to this case?
[13] **A** Yes.
[14] **Q** What witness would that be?
[15] **A** Mr. Holman.
[16] **Q** Kyle Holman asked -- is that the person
[17] you testified asked you to relocate him?
[18] **A** Yes, on Wednesday.
[19] **Q** Do you have that file?
[20] **A** Do I have that file, no, I don't have that
[21] file. Another one of my staff has that file.
[22] **Q** The date, February 22nd, you said this
[23] morning that was your first conversation with
[24] Charles Tolbert are you saying that's from your
[25] memory also?

[1] ---
[2] ---
[3] DIRECT EXAMINATION
[4] ---
[5] **BY MR. LORUSSO**:
[6] **Q** Mr. Wright, good afternoon. You testified
[7] before this jury last Tuesday, is that correct?
[8] **A** Yes.
[9] **Q** Following your testimony did something
[10] occur outside of the courtroom that caused me to
[11] request your continued presence in court until I
[12] could call you to testify?
[13] **A** Yes.
[14] **Q** Would you tell the jury what that was?
[15] **A** Basically the lady came out the courtroom
[16] after I was done, walking down the hall, she came
[17] out crying, hysterical. She came over and
[18] introduced herself to me and gave me a hug and
[19] that's pretty much the extent of it.
[20] **Q** Did that lady identify herself?
[21] **A** She said she was little Johnnie's mother.
[22] **Q** Do you know that woman?
[23] **A** No, I don't.
[24] **Q** Do you see her in the courtroom?
[25] **A** Yes, I do.

[1] Q Would you point her out for the record?
[2] A The lady right there.
[3] Q The lady waving her hand?
[4] A Yes.
[5] MS. FORCHETTI: Indicating by point of
[6] finger the woman that we have previously
[7] identified as Johnnie Simmons' mother.
[8] BY MR. LORUSSO:
[9] Q Did she say anything to you?
[10] A Just thank you and I told her, for what.
[11] I basically just told her I don't know what you're
[12] thanking me for. I really didn't understand what
[13] was going on. She came out. She was distraught.
[14] She was crying. She reached out, she gave me a hug
[15] and me being a gentleman that's all it was. I
[16] didn't push her away or anything. That was the
[17] extent of the conversation.
[18] Q This hug or embrace, whatever, how long
[19] did that last, by the way?
[20] A A few seconds. I mean she was real
[21] distraught. It's just not my nature to push a
[22] crying woman away, didn't matter what the
[23] circumstances was because it kind of caught me off
[24] guard.
[25] Q Did you hug her back at all?

[1] A Yes, from the name, yes.
[2] Q You worked in that neighborhood for a
[3] considerable period of time, right?
[4] A Yes.
[5] Q So you know little Johnnie from the
[6] neighborhood?
[7] A Yes.
[8] Q Mr. Wright, were you aware that the
[9] testimony was still ongoing, there was a witness who
[10] testified after you?
[11] A Yes.
[12] Q You left another person came in?
[13] A Right, but I wasn't aware of that. You
[14] have to understand when I left it was to my
[15] knowledge that I was done, I was leaving. As I'm
[16] walking down the hall she came out the other door.
[17] I mean I went out this way, she came out that way.
[18] She kind of just came right out in front of me and
[19] cut me off.
[20] Q So the defendant's mother came out looking
[21] for you?
[22] A Yeah. I mean if somebody told you they
[23] saw me hug her they obviously came to you and said
[24] they saw her hug me. It's not like I searched her
[25] out. I didn't even know the lady. I was just being

[1] A Yes. When she reached out and hugged me
[2] she was crying. She was distraught. I just told
[3] her I hope everything work out for her.
[4] Q You characterize that as lasting a few
[5] seconds?
[6] A Yes.
[7] MR. LORUSSO: Thank you. I have nothing
[8] further.
[9] THE COURT: You may cross.
[10] - - -
[11] CROSS-EXAMINATION
[12] - - -
[13] BY MS. FORCHETTI:
[14] Q Good afternoon, Mr. Wright. When you
[15] testified before do you remember telling us that you
[16] didn't know the defendant?
[17] A No. I don't know him.
[18] Q When the defendant's mom approached you
[19] and said I'm little Johnnie's mother you knew who
[20] she was talking about though, right?
[21] A No, I didn't know. When she came out she
[22] came out and said I'm little Johnnie's mother. As
[23] far as him being little Johnnie, yeah, that's the
[24] extent of it, but I don't know her.
[25] Q So you do know who little Johnnie is?

[1] a gentleman. I mean that's what you call being a
[2] gentleman. I'm not going to push a crying lady away
[3] no matter what the circumstances is. She's not on
[4] trial. All I saw was a crying lady. She came
[5] running into my arms. What was I supposed to do,
[6] push her away.
[7] Q So it's your testimony here today that
[8] this woman, the defendant's mother is a complete
[9] stranger to you?
[10] A Yes, don't know her.
[11] Q She left an active courtroom of her son's
[12] trial to seek you out, a complete stranger, just to
[13] throw herself into your arms?
[14] A See you making it look like -- you're
[15] making it look like she just came -- listen, I don't
[16] know the lady. If you're asking what she felt about
[17] the situation you have to ask her. I know when I
[18] left out of here my intent was I'm done, I'm going
[19] home with my family.
[20] Q You didn't really want to be a part of
[21] this case, right?
[22] A I don't want to be a part of none of this
[23] right now. I want to get home to my grandmother. I
[24] told you that. If a woman runs up to a guy, I
[25] wasn't raised to be disrespectful. That's not me.

[1] She came out, she was crying. What was I supposed
[2] to do, tell her to get away from me? That would
[3] have been rude. I'm not raised like that. You can
[4] come crying and I would have hug you just the same
[5] if you needed it. But I don't understand where this
[6] is going. Like I said, I thought I was done. I'm
[7] going home. Now I'm back in here two days for a
[8] hug.

[9] **Q** You never wanted to be a part of this case
[10] at all?

[11] **A** I was going to work. I was at work. None
[12] of this had took place I would probably still be at
[13] work.

[14] **MS. FORCHETTI**: Thank you. I have nothing
[15] further.

[16] **THE COURT**: You have anything further?

[17] **MR. LORUSSO**: No, Your Honor.

[18] **THE COURT**: You may step down.

[19] (Witness excused.)

[20] **THE COURT**: Mr. Lorusso, you may continue.

[21] **MR. LORUSSO**: There is a stipulation

[22] that's been entered into by and between
[23] counsel.

[24] **THE COURT**: Ladies and gentlemen, please
[25] recall the instruction I gave you on how you

[1] (Discussion was held off the record.)

[2] **THE COURT**: Ladies and gentlemen, you've
[3] now heard all the evidence which is to be heard
[4] in this case. The next thing is for the
[5] attorneys to make closing arguments after which
[6] I shall instruct you in the law. It's now a
[7] quarter after 12:00 and I must meet with the
[8] attorneys before the arguments commence so we
[9] will take our lunch and recess now. I should
[10] hope that we can be back in the courtroom ready
[11] to proceed at 1:45. So if you would get back
[12] in the site designated by the crier and the
[13] court officer at about 1:30 we can have you
[14] here in the box at 1:45 at that point closing
[15] arguments will commence. I shall thereafter
[16] instruct you in the law that you will need for
[17] deliberations. Enjoy your lunch.

[18] - - -

[19] (The jury exited the courtroom at
[20] 12:17 p.m.)

[21] - - -

[22] **THE COURT**: Let the record reflect the
[23] jurors are all out of the room. I very much
[24] appreciate if everybody will remain in place
[25] until such time as the jurors are off the

[1] should receive stipulated testimony. You may
[2] proceed.

[3] **MR. LORUSSO**: Ladies and gentlemen, the
[4] stipulation or the agreement is that the letter
[5] that has been marked into evidence as
[6] Commonwealth's Exhibit 12, a letter that's been
[7] identified as having been authored by Charles
[8] Tolbert and addressed to Johnnie Simmons was
[9] provided to Ms. Forchetti, the district
[10] attorney's office, by me as Johnnie Simmons'
[11] attorney. That's the stipulation.

[12] **THE COURT**: So stipulated?

[13] **MS. FORCHETTI**: Yes, Your Honor.

[14] **THE COURT**: Very well.

[15] **MR. LORUSSO**: With that stipulation the
[16] defense would rest and move for the admission
[17] of defense exhibits and rest on behalf of
[18] Johnnie Simmons.

[19] **THE COURT**: Any objection?

[20] **MS. FORCHETTI**: No, Your Honor.

[21] **THE COURT**: They will be received.

[22] Defense rest.

[23] **MR. LORUSSO**: Yes, Your Honor.

[24] **THE COURT**: May I see counsel for a
[25] moment.

[1] floor. We know that when the court officer
[2] comes back to advise us. Mr. Lorusso, Ms.
[3] Forchetti, the court will now convene a
[4] charging conference. If you have points for
[5] charge you wish me to present to the jury
[6] please hand them up.

[7] **MR. LORUSSO**: Your Honor, forgive the
[8] informality of those.

[9] **THE COURT**: Do you have something you
[10] wanted to hand up?

[11] **MS. FORCHETTI**: No, Your Honor. I believe
[12] we discussed it already.

[13] **MR. LORUSSO**: I request the standard
[14] charge except for the one I had written out.
[15] Can I also inquire concerning your no adverse
[16] inference charge. Does Your Honor instruct the
[17] jury at all with regard to his right founded
[18] upon the right of self-incrimination.

[19] **THE COURT**: I read it to you.

[20] **MR. LORUSSO**: The one that you just gave
[21] during the -- that's fine.

[22] **THE COURT**: Mr. Lorusso, I'll hear first
[23] from you. Which points you wish to offer?

[24] **MR. LORUSSO**: I would ask Your Honor to
[25] charge in the typed portion of what I wrote

[1] that point of law dealing with the information
[2] about an anonymous call that Johnnie Simmons
[3] was the shooter is not for the truth of the
[4] matter stated.

[5] **THE COURT:** Would you read it into the
[6] record?

[7] **MR. LORUSSO:** I ask Your Honor to charge
[8] **as follows:** There was testimony that an
[9] anonymous phone call was received that the
[10] defendant Johnnie Simmons was the person who
[11] shot Charles Tolbert. This testimony was
[12] presented not for the truth of its contents but
[13] to show what may have been a reason for the
[14] arrest of Johnnie Simmons. Since this
[15] information was received from an unnamed source
[16] who did not testify in court you may not
[17] consider this testimony as evidence that
[18] Johnnie Simmons was in fact the person who shot
[19] Charles Tolbert but may consider it only to the
[20] extent that it may assist you in determining
[21] the basis for Johnnie Simmons' arrest.

[22] **THE COURT:** Commonwealth.

[23] **MS. FORCHETTI:** I would object to it as
[24] being unnecessary. You were clear in
[25] instructing the jury at the time why that

[1] instruction. It's an alternative instruction,
[2] counsel. I have no idea what this means and I
[3] want to do this in a way that is appropriate.
[4] So when we left here on Wednesday I asked the
[5] two of you if you had requests for points you
[6] had all day Thursday and Friday to get this.

[7] **MR. LORUSSO:** I apologize. I was
[8] referring Your Honor to the use of a prior
[9] inconsistent statement for impeachment
[10] purposes.

[11] **THE COURT:** I would like to know precisely
[12] what you're asking for, counsel. They're
[13] standard instructions. I don't know what that
[14] means so I want the words that you want me to
[15] give to the jury. Like you wrote out the first
[16] one. That's what I asked you to do. They're
[17] all in the books. What else do you want?

[18] **MR. LORUSSO:** Your Honor, I would ask Your
[19] Honor to charge on flight. There was testimony
[20] from Kyle Holman who identified Mr. Simmons
[21] that upon hearing sirens or activity that he
[22] speeded up or I don't recall specifically
[23] whether he started walking fast from the area
[24] in the driveway. So I would ask Your Honor to
[25] charge the jury that flight in and of itself is

[1] testimony was admissible.

[2] **THE COURT:** What aspects of the case is
[3] this? Is this when he was picked up and a
[4] photograph was taken?

[5] **MS. FORCHETTI:** Correct.

[6] **THE COURT:** Is that it?

[7] **MR. LORUSSO:** It is, Your Honor.

[8] **THE COURT:** I'll charge it. Next.

[9] **MR. LORUSSO:** I'd ask Your Honor to charge
[10] false in one, false in all.

[11] **THE COURT:** Granted.

[12] **MR. LORUSSO:** Prior inconsistent
[13] statement.

[14] **THE COURT:** I'm not sure what you mean by
[15] that. That's why I asked you guys on Wednesday
[16] to present the proposed instructions that you
[17] want. Can you tell me what it is that you mean
[18] by that, read the instruction as it appears.

[19] **MR. LORUSSO:** I don't have the
[20] instruction.

[21] **THE COURT:** We've been in recess since
[22] last Wednesday.

[23] **MR. LORUSSO:** I'm just asking for the
[24] standard charge.

[25] **THE COURT:** There is no standard

[1] not evidence of a crime.

[2] **THE COURT:** I am going to recess now. If
[3] either one of you have standard instructions
[4] you wish me to offer get the instructions and
[5] present it to me. Let's take a recess until
[6] 1:30.

[7] (Luncheon recess taken.)

[8] - - -

[9] (Court reconvened at 1:30 p.m.)

[10] - - -

[11] **THE COURT:** We're on the record in the
[12] trial case Commonwealth versus Simmons
[13] CR-0004773-2011. Mr. Simmons is here with his
[14] attorney Mr. Lorusso. The Commonwealth, Ms.
[15] Forchetti. When we recessed for lunch we had
[16] commenced our charging conference and I want
[17] you both to appreciate that this is a formal
[18] charging conference so if there are points you
[19] wish me to consider and/or impart the jury this
[20] is the time to raise them. Mr. Lorusso.

[21] **MR. LORUSSO:** If Your Honor please I have
[22] requests for false in one/false in all charge
[23] in addition to the one this morning Your Honor
[24] indicated you will instruct the jury.

[25] **THE COURT:** All right. I'll charge on

[1] that. What else do you want?
[2] **MR. LORUSSO:** That's it, Your Honor. that
[3] and the one from this morning.
[4] **THE COURT:** Commonwealth.
[5] **MS. FORCHETTI:** Your Honor, I did provide
[6] to you during the lunch break the flight
[7] charge. I also provided the motive charge. I
[8] think the motive is standard charge 3.13 and
[9] the flight charge is 3.14, the standard
[10] criminal jury instructions.
[11] I also handed up to Your Honor several
[12] points of charge that have to do with the
[13] charge of attempted murder. I'm not sure if
[14] Your Honor has assembled his own charge of
[15] attempted murder.
[16] **THE COURT:** I have but I appreciate it
[17] when counsel presents all charges, I always do,
[18] but thank you for presenting what you did. I
[19] will charge on flight. I will charge on
[20] motive. I will charge on attempted murder. Is
[21] there anything else?
[22] **MS. FORCHETTI:** The statement of prior
[23] inconsistent statement I would ask that you
[24] give the first alternative, prior inconsistent
[25] statement, as substantive evidence that does

[1] want to come around and look at it to make sure
[2] that what you want is there please feel free to
[3] do that.
[4] Counsel, before we bring the jurors out I
[5] have a proposed draft of the verdict sheet
[6] which is not yet written in stone. Take a look
[7] at it and mark it up. If there's something in
[8] it you take objection with just line it out and
[9] we can go through this and get it prepared
[10] before you close. Are you asking for a charge
[11] on my aggravated assault causing serious bodily
[12] injury, attempted serious bodily injury, one,
[13] the other, or both?
[14] **MS. FORCHETTI:** I think causing serious
[15] bodily injury. I don't think there's any issue
[16] with respect to that.
[17] **THE COURT:** Okay. Have the two of you had
[18] an opportunity to review the sheet?
[19] **MS. FORCHETTI:** Yes, Your Honor.
[20] **THE COURT:** Let's start with you,
[21] Mr. Lorusso, is there anything you find
[22] objectionable?
[23] **MR. LORUSSO:** No, Your Honor.
[24] **THE COURT:** Ms. Forchetti.
[25] **MS. FORCHETTI:** No, Your Honor.

[1] give the option as Mr. Lorusso had requested
[2] that the jury may decide whether or not to
[3] consider the evidence as substantive evidence
[4] or merely as going to credibility.
[5] **THE COURT:** That's appropriate in this
[6] case. I'll charge. Anything else?
[7] **MS. FORCHETTI:** No, Your Honor.
[8] **THE COURT:** Okay. As soon as the jurors
[9] come back we'll have speeches and charge.
[10] (Short recess taken.)
[11] **MS. FORCHETTI:** Your Honor, I know I
[12] mentioned on Wednesday that I asked you if you
[13] charge direct and circumstantial evidence as
[14] part of your standard.
[15] **THE COURT:** Yes, I do. Anything else,
[16] Mr. Lorusso?
[17] **MR. LORUSSO:** No, Your Honor.
[18] **THE COURT:** Are the two of you ready?
[19] **MS. FORCHETTI:** Yes. I would ask that the
[20] court have the exhibits ready.
[21] **THE COURT:** What I request is that the
[22] attorneys do is go through the pile so that
[23] you're not trying to close and looking for the
[24] exhibits and what you want isn't there because
[25] that can be embarrassing. If the two of you

[1] **THE COURT:** So as soon as the jurors come
[2] in we'll go right into closing arguments.
[3] Counsel, I'm advised that the jurors are
[4] on their way up. So is the evidence close on
[5] the Commonwealth side?
[6] **MS. FORCHETTI:** Yes, Your Honor.
[7] **THE COURT:** Is everything closed on the
[8] defense side?
[9] **MR. LORUSSO:** Yes, Your Honor.
[10] - - -
[11] (The jury entered the courtroom at
[12] 1:49 p.m.)
[13] - - -
[14] **THE COURT:** Good afternoon, ladies and
[15] gentlemen. Members of the jury, now that
[16] you've heard all the evidence which is to be
[17] presented in this case the next step is for the
[18] attorneys to make closing arguments. Now, even
[19] though these arguments do not constitute
[20] evidence, you should consider them very
[21] carefully. In their arguments the attorneys
[22] for both sides will call to your attention the
[23] evidence which they consider material and they
[24] will ask you to draw certain inferences from
[25] that evidence. You must keep in mind, however,

[1] that you are not bound by the attorneys'
[2] recollection of the evidence. It is your
[3] recollection of the evidence and yours alone
[4] which must guide you during your deliberations.
[5] so if there is a discrepancy between an
[6] attorney's recollection and your own you are
[7] obviously guided by your recollection of the
[8] evidence. Nor are you limited in your
[9] consideration of the evidence to that which is
[10] mentioned by these attorneys. You must
[11] consider all of the evidence which you deem
[12] material to the issues involved in this case.

[13] Now, to the extent that an inference or
[14] the inferences which an attorney or the
[15] attorneys ask you to draw is supported by the
[16] evidence and appeals to your reason and your
[17] judgment then you may consider that inference
[18] or those inferences in your deliberations.

[19] Jurors, the attorneys may also call to
[20] your attention certain principles of law in the
[21] course of their closing arguments. You must
[22] remember, however, that you are not bound by
[23] any principle of law mentioned by either
[24] attorney. You must on your oath accept and
[25] apply only the law which I instruct you to the

[1] presented in this case and you really
[2] demonstrated to us that you'll take your oath
[3] seriously. You'll abide by the instructions of
[4] law that His Honor gives you upon which to
[5] deliberate and you will reach a verdict in this
[6] case based upon your careful determination of
[7] the facts in conjunction with the principles of
[8] law that His Honor will instruct you to apply
[9] in this case. And for your service up until
[10] now and through the determination of this case
[11] Johnnie Simmons and I both thank you.

[12] This is an opportunity at this point as
[13] His Honor said to suggest to you what I believe
[14] the evidence of this case shows and did you
[15] want show. You see by that clock right now
[16] it's about according to that clock eight
[17] minutes to 2:00 and I just want to set this so
[18] that I remember when five minutes goes by when
[19] I look at that clock. What I want to go over
[20] and I'm not going to go over every witness's
[21] testimony in the case and certainly the
[22] witnesses that I go over I'm going to really
[23] try and hit what I suggest to you are the high
[24] points or the relevant points because I'm
[25] pretty sure you don't want to spend another day

[1] facts as you jurors determine the facts to be
[2] in reaching your verdict in this case.

[3] Now, ladies and gentlemen, under the rules
[4] promulgated by the Supreme Court of
[5] Pennsylvania Mr. Lorusso, counsel to the
[6] defendant, will address you first followed
[7] thereafter by Mrs. Forchetti, counsel for the
[8] Commonwealth, and thereafter, I shall instruct
[9] you in the law of the case.

[10] Ms. Forchetti, Mr. Lorusso, are you two
[11] ready to proceed?

[12] **MS. FORCHETTI:** Yes, Your Honor.

[13] **MR. LORUSSO:** Yes, Your Honor.

[14] **THE COURT:** Then I shall call first on
[15] you, Mr. Lorusso. You may address the jury.

[16] **MR. LORUSSO:** Thank you, Your Honor. May
[17] it please the court, Ms. Forchetti, ladies and
[18] gentlemen of the jury, good afternoon.

[19] Again, I want to thank you personally and
[20] on behalf of Johnnie Simmons for taking this
[21] time to serve this most important function.
[22] I'm sure this has not been a television
[23] thriller for you for the most part.
[24] Nevertheless, I know this, as we all did that,
[25] you really paid attention to the evidence

[1] and a half listening to me telling you what you
[2] already heard over the past couple of days.

[3] Let's go to I believe the first witness
[4] that was called in this case was Police Officer
[5] Alexander. Police Officer Alexander was the
[6] witness if you remember who was actually
[7] getting his eyeglasses fixed or something
[8] across Stenton Avenue across where this
[9] incident occurred. He hears gunshots. He
[10] arrives, gun drawn, running down the street,
[11] sees a victim in the street, sees blood, learns
[12] from a witness that the person who at least the
[13] witness describes as the shooter is heading
[14] down the driveway. You recall that we had
[15] marked a photograph that depicted the driveway
[16] as C-1 and that's been admitted into evidence
[17] and if you'll recall the testimony and again
[18] I'm going to tell you what my recollection of
[19] the evidence is, as is Ms. Forchetti, but it's
[20] really your recollection of the evidence that
[21] controls in this matter. I'm sure if either of
[22] us says something that's different from what
[23] you recall you be guided by what you recall the
[24] evidence to be or in your deliberations you
[25] determine the evidence to be. But with that

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[1] disclaimer my recollection is that the
[2] information provided to Officer Alexander was
[3] that the person described as the shooter headed
[4] down the driveway depicted in C-1 here which
[5] would have been, if you recall, south of
[6] Stenton Avenue in the 1300 block of Johnson
[7] Street. Officer Alexander gave chase down that
[8] driveway. Officer Alexander's description of
[9] that person that he was chasing in his
[10] testimony was of a male who was six foot tall
[11] in height, in fact, asked a question on the
[12] Commonwealth's Exhibit "C" that he accepted as
[13] being his statement, it was the same as his
[14] testimony, he said that that person who he saw
[15] running down the alleyway was about six foot
[16] tall, had on a black hoodie, black pants. The
[17] hoodie was up on his head so he didn't see his
[18] face. Officer Alexander was behind him.
[19] That's what he said that day. My recollection
[20] is that is what his testimony was when he
[21] appeared before you. He said when I asked him
[22] that he observed and he followed this man down
[23] the driveway until and recall this in there if
[24] you will because I do he says the person made a
[25] turn and at that point in time since Officer

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[1] after the incident occurs.
[2] After Officer Alexander testifies and
[3] gives us that information we hear from Gerald
[4] Wright. We actually heard from him twice. You
[5] heard from him today because it seems as though
[6] there are three rings going on in this trial.
[7] There are too many trials that are encompassed
[8] here. One of them has to do with who shot
[9] Charles Tolbert and I think that's the one that
[10] you're here to determine whether the
[11] Commonwealth has proved this case against
[12] Johnnie Simmons beyond a reasonable doubt. I'm
[13] sorry. So that would mean I guess that I've
[14] talked to you for five minutes now from when I
[15] initially called your attention to that. I
[16] will ask you to keep that in mind as it relates
[17] to the second mini trial, the one about the
[18] embrace by Johnnie Simmons' mother outside the
[19] courtroom.
[20] The testimony presented by Joel Wright and
[21] just to jump ahead a bit. The detective who
[22] took his statement my recollection is
[23] characterized Gerald Wright as being a
[24] forthcoming witness when he was being
[25] interviewed. What did Mr. Wright say. He was

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[1] Alexander didn't have a vest on he didn't want
[2] to get ambushed and that's certainly very
[3] understandable. So he stopped pursuit. But
[4] when he was asked which direction the gentleman
[5] turned or the individual described as six foot
[6] tall wearing black turned, I think he said to
[7] the right but I don't know if I was sure with
[8] the answer so I said to him was he heading
[9] toward Center City or heading toward Cheltenham
[10] Avenue and my recollection is he said he was
[11] heading toward Center City. He made a right
[12] turn on what he initially described as
[13] Washington Lane. Then I said to him, if you
[14] look at this map here and this is a map that we
[15] identified as D-1 for identification, which
[16] depicts Stenton Avenue and the 1300 block of
[17] Johnson Street over on this side south of
[18] Stenton Avenue, the officer said when I showed
[19] him the map I said if I told you it's Duvul
[20] Street that he turned on and not Washington
[21] Lane which would be further down would that be
[22] accurate and I think he said yeah. He has this
[23] six foot tall individual running through the
[24] driveway and then running south on Duval Street
[25] and he's chasing him at the time this is right

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[1] privy to an individual coming into the store.
[2] He knew Charles Tolbert from the neighborhood
[3] because Charles Tolbert said he had just gotten
[4] out of jail, he was looking for a phone, and
[5] Mr. Wright said, come back, I'll hook you up
[6] when you're ready. He said I did do that so
[7] Charles Tolbert is in the store and my
[8] recollection is that Gerald Wright tells us
[9] that he observed another individual come into
[10] the store, grab a shirt, put it on the counter
[11] I believe, I don't recall whether he purchased
[12] it or not, I don't think that was the
[13] testimony. But observes and maybe even hears a
[14] comment to Charles Tolbert from this person,
[15] can I holler at you. And Mr. Wright tells us I
[16] just assumed he was talking about can you get
[17] me a cigarette or something like that. So next
[18] thing that happens I mean Mr. Wright is on the
[19] phone with his wife. He's done with the female
[20] customer. He says he looks out the door and
[21] sees a car that's stuck in the driveway, goes
[22] out, then sees Officer Alexander running by,
[23] the person he later describes I guess from
[24] seeing the police pants with a gun in his hand,
[25] realizes that he's a police officer. Well, you

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[1] know this case is about who done it and Gerald
[2] Ingram testifies with respect to description
[3] and this is obviously again your recollection
[4] but we actually saw him again today. But when
[5] I asked him about the complexion of the
[6] individual he said he was his complexion. When
[7] I asked him to describe that he said brown, I'm
[8] brown. That's what he was saying the other
[9] day. When I asked him to compare that
[10] complexion to Johnnie Simmons' complexion, no,
[11] Johnnie Simmons isn't my complexion, Johnnie
[12] Simmons is light. When I asked Mr. Wright if
[13] he could approximate the height of this
[14] individual who came in the store and grabbed
[15] this shirt you'll recall, and I guess it makes
[16] sense if you're six foot nine, he said
[17] everybody is short to me. But what he did say
[18] was for purposes of comparison he said and he
[19] worked in that store for sometime I believe
[20] that the racks were about five foot ten, the
[21] clothing racks, and we've got photographs of
[22] that, and he said ball parking it with the
[23] signs that are above the racks I would say
[24] they're about six foot seven. He said this guy
[25] that came in I could barely see him over the

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[1] that is you know there was evidence in this
[2] case and His Honor is going to tell you what
[3] you can consider this evidence for as it
[4] relates to guilt or innocence. Evidence in
[5] this case that something happened somewhere not
[6] the captain who was being driven by Officer
[7] Long but another captain gets an anonymous
[8] phone call saying Johnnie Simmons was the
[9] shooter. So lo and behold what are we doing
[10] now with that information. We're locking
[11] Johnnie Simmons up. What does Officer Long do
[12] he's the captain driver, they're out there on
[13] the street, and what happens they see Johnnie
[14] Simmons, he goes into, Officer Long, into the
[15] barbershop following him, takes him down
[16] because Johnnie Simmons I guess according to
[17] the officer's testimony is offering some type
[18] of resistance, takes him down to the extent
[19] let's consider the disparity in sizes, takes
[20] him down and the report even he said that
[21] Johnnie Simmons refused hospital treatment so I
[22] don't know why that issue even came up unless
[23] it seemed to be warranted at the time. But
[24] they take Johnnie Simmons in and we don't learn
[25] this from Officer Long -- I'm sorry, we do

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[1] racks of clothing. So that limits -- that
[2] means that the guy may be no more than five
[3] foot ten. We've got evidence on the record
[4] here that Johnnie Simmons because you recall,
[5] and I'll get to that point, when they arrested
[6] him, when Officer Long took him down and they
[7] took him in and photographed him at Northeast
[8] Detectives on February 4th Johnnie Simmons was
[9] described in that exhibit as being five foot
[10] five inches, 140 pounds. A little different,
[11] I'm going to suggest to you, than five foot ten
[12] inches or six foot.

[13] Let's to get to because my recollection
[14] isn't in terms of the sequences of witnesses
[15] Charles Tolbert came after Gerald Wright. But
[16] if you would bear with me I would like to go
[17] right to Officer Long's testimony because what
[18] I think we have in Officer Long's testimony is
[19] really the meat of this case. Do you remember
[20] that what I suggested to you in my opening
[21] remarks to you was that this prosecution
[22] reminded me of Admiral Ferugot's battle cry
[23] damn the torpedos, full speed ahead. This was
[24] damn the evidence full speed ahead in terms of
[25] prosecuting Johnnie Simmons. The reason I say

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[1] learn from Officer Long that they take Johnnie
[2] Simmons into custody at the barbershop at
[3] Washington Lane and Stenton Avenue. They
[4] actually drive him to Gerald Wright's place of
[5] employment. Johnnie Simmons is in the police
[6] car and there's an identification procedure
[7] that we have no documentation about but we
[8] learned from Officer Long that at that time
[9] within hours of this shooting Gerald Wright
[10] said I can't make an identification of this
[11] person.

[12] So what do they do next, Officer Long, I
[13] think he said he wasn't sure whether they
[14] transported him or they got somebody else to
[15] transport Johnnie Simmons into Northwest
[16] Detectives. They take a photograph of Johnnie
[17] Simmons on February 4th so that they can show
[18] Johnnie Simmons' picture to Charles Tolbert at
[19] some point in time. So they get this
[20] photograph of Johnnie Simmons and fortunately I
[21] guess to a certain extent they also record the
[22] clothing that Johnnie was wearing at the time
[23] on that 48A, 75-48A, I believe it was called.
[24] And at the time when he was arrested I guess
[25] this is a couple of hours after the shooting,

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[1] he is wearing blue jeans because I asked
[2] Officer Long blue jeans like Wranglers as
[3] oppose to black jeans. He was wearing a blue
[4] and black hoodie and I asked him to describe
[5] that further and he just didn't recall. I
[6] suggested like you mean maybe black sleeves
[7] different color sleeves and he said, yeah,
[8] something like that. He was wearing blue
[9] boots. This is while he's inside Northwest
[10] Detectives Division a couple of hours after
[11] this shooting occurs. The interesting thing is
[12] and why I'm going to suggest to you that
[13] Officer Long really with his statement tells
[14] you a whole lot more about this case than first
[15] meets the eye is this whole, again, the focus
[16] on Johnnie Simmons. The focus on Johnnie
[17] Simmons doesn't have a thing to do with fitting
[18] any descriptions. The focus on Johnnie Simmons
[19] has to do with this anonymous phone call. And
[20] let's look at how this anonymous phone call is
[21] so forthrightly mentioned in Officer Long's
[22] statement. You'll recall that was a
[23] Commonwealth's Exhibit C-18 and the officer
[24] said, yes, this was the information that he
[25] provided on February 24th. He is asked a

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[1] old." No further information. He didn't want
[2] to get involved.
[3] I'm going to defy you to conclude anything
[4] other than what Officer Long and Detective
[5] Acerenza were composing here was a suggestion
[6] that this person who fingered Johnnie Simmons
[7] was present at the location and pointed to
[8] Johnnie Simmons or pointed to the barbershop as
[9] oppose to a call going down the road. A call
[10] to some captain and then a call to another
[11] captain and then lock Johnnie Simmons up as
[12] oppose to the clear impression that you get
[13] here that Officer Long was talking to this
[14] person, a person that refused to give his name,
[15] stated Johnnie Simmons just walked into the
[16] barbershop. Give me a break. When I asked
[17] him, well, you know, because he did admit that
[18] yeah this was all telephone call information.
[19] It was from an anonymous person, we don't know
[20] who that was. I said, how do you describe that
[21] person if you don't know who it was. What's
[22] his response. Well, I went to captain in the
[23] interim from February 4th to February 24th.
[24] When I told him that they wanted to interview
[25] me about the arrest of Johnnie Simmons on

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[1] question by the assigned detective, Detective
[2] Acerenza, can you tell me about the pedestrian
[3] information that you conducted on Johnnie
[4] Simmons on February 4, 2011? And Officer
[5] Long's answer is: "After the shooting occurred
[6] myself and my Captain Dales, Badge 17 were in
[7] the area. We were talking to people and asking
[8] them about the shooting. A person that refused
[9] to give his name stated that, quote, Johnnie
[10] Simmons also known as Little Johnnie, a short
[11] guy with medium brown skin and a lot of hair
[12] just walked into the barbershop. He said
[13] Little Johnnie was the shooter from 1300 East
[14] Johnson Street. Johnnie walked into the
[15] barbershop, he point to the barbershop." This
[16] person pointed to the barbershop who gave that
[17] information. Other question goes down: "Did
[18] that male that gave you the information that
[19] Johnnie Simmons was the shooter say anything
[20] else?
[21] "No. He just said Johnnie Simmons was the
[22] shooter.
[23] "Question: Can you describe the male that
[24] gave you the information.
[25] "Black male, late 30s to early 40 years

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[1] February 4th when we got his picture and I said
[2] what can I do there. Oh, he gave me the
[3] description of who that person was that called.
[4] You really believe that. I mean when you are
[5] selected as jurors you don't check your common
[6] sense outside the jury box. I don't mean to
[7] offend anybody, but I'm going to tell you that
[8] that reminds me a long time ago I'm not a big
[9] show goer but I saw the show I remember the
[10] line and boy, oh boy as I heard Officer Long's
[11] testimony the line rang true to me. It was a
[12] line in the show, saw it as I said 25 years ago
[13] my wife but still remember the line. Best
[14] Little Whorehouse of Texas. The guy says when
[15] he's getting the business from somebody a lot
[16] of hot air, a lot of nonsense he says, "stop
[17] pissing on my cowboy boots and telling me that
[18] it's a rainstorm." That's exactly what came to
[19] my mind when I heard the testimony of Officer
[20] Long and compared it to the composition that
[21] was an effort to state that this anonymous tip
[22] came from a real live person who was really
[23] present at the time and pointed into the
[24] barbershop at Johnnie Simmons. So that's what
[25] this prosecution is based upon, an anonymous

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[1] tip.
[2] What is there in the evidence that
[3] corroborates Johnnie Simmons as being the
[4] shooter. Let's see. We've got descriptions of
[5] tall people, black hoodie, six foot person.
[6] Charles Tolbert, what does he do? What's the
[7] description that he gives of the shooter? In
[8] his statement you heard Charles Tolbert testify
[9] and I don't think a whole lot more needs to be
[10] said about Charles Tolbert or the extent of any
[11] weight that you should give to his testimony.
[12] And of course that all flies into the third
[13] ring of this episode and that will be the ring
[14] of witness intimidation. Did Charles Tolbert
[15] appear an individual to you who would be
[16] intimidated by anything. That's a
[17] determination again that you make based upon
[18] your every day experience. But what does
[19] Charles Tolbert describe the shooter as looking
[20] like? Well, according to this statement on
[21] February 8th at 9:55 p.m., that's the day
[22] that's five minutes after the photographs which
[23] I'll get into later, he's asked a question:
[24] "Can you describe the male that shot you?"
[25] "Answer: Slim, light skinned, short

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[1] to get in his face a little bit challenging a
[2] lot of things that maybe I really shouldn't
[3] have challenged. Because when you think about
[4] it he says that this individual picked up his
[5] pace when I think he heard sirens or something.
[6] Of course, God only knows how many people would
[7] pick up their pace in that neighborhood or any
[8] other number of neighborhoods when they heard
[9] sirens that they have nothing to do with the
[10] what the purpose of the what the sirens is for.
[11] He also says that this male was walking quickly
[12] up the street, crossed over, we're talking
[13] about the 1400 block of Johnson Street where
[14] Kyle Holman was making these observations. So
[15] that would be on the north side of Stenton
[16] Avenue. He says that the person walks through
[17] the driveway between Johnson and Duval on the
[18] 1400 block. The person then crosses the next
[19] street which would be Mansfield according to
[20] this map, walked 12 or 13 houses and then makes
[21] a left turn towards Johnson Street. Now, he's
[22] in the 1500 block of Johnson Street. The
[23] reason I'm saying, well, maybe the guy actually
[24] can identify the guy is because obviously
[25] Johnnie Simmons you heard evidence lives in

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[1] skinny face, small head, khaki set or cargo
[2] set, tan or beige. No facial hair. Nineteen
[3] to 20 years old."
[4] Kyle Holman, I think the last person who
[5] testified, is the guy who is fixing the caliber
[6] or changing the caliber on his brakes inside of
[7] his driveway on this snowy day. Kyle Holman I
[8] think I just personally had a problem with
[9] somebody who under the circumstances that he
[10] said occurred that day and those circumstances
[11] I mean are somebody that's wheeling by on ice
[12] next to him in the driveway wearing a hoodie
[13] that's covering his head and everything like
[14] that and he sees this guy for however long a
[15] period that is and doesn't see him again until
[16] he comes into court and sees Johnnie Simmons
[17] and says, oh, that's him, under the
[18] circumstances. Gee, let's see you're going to
[19] testify at trial, who's the young black guy
[20] that might be charged in this case, yeah, he's
[21] the one. So I hid in my mind I just had a
[22] problem I guess with the idea that somebody
[23] could really make that identification and I
[24] guess that's what motivated me to maybe I don't
[25] know, I got in his face a little bit or I tried

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[1] that neck of the woods right around that area
[2] 12 or 13 houses probably is 15, 20 something
[3] Johnson Street. So maybe that was Johnnie
[4] Simmons that he saw that maybe I shouldn't have
[5] tried to lip him around a little bit with
[6] inconsistencies. The reason for that would be
[7] that was like right while it was happening.
[8] His description wasn't of a guy wearing a khaki
[9] or a cargo set. It was a description of a guy
[10] wearing silver, black, I think he said with a
[11] silver shine to them, jeans. And you remember
[12] I forget what he characterized it as decorator
[13] jeans but I don't know. But I think he took
[14] from that that I was suggesting something
[15] racial about it and I just really didn't know
[16] what the term was he was using. He said, well,
[17] these are jeans that African American males
[18] would wear. Okay. That's fine. They weren't
[19] khaki or tan cargo pants, were they, or let
[20] alone a set because that's what Charles Tolbert
[21] said was worn by the person who shot me. Kyle
[22] Holman gives a description and we heard his
[23] description played on police radio even. That
[24] description was he said I think I recall his
[25] words exactly, he said, well, as he's talking

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[1] to the 911 operator, I'm five, ten, he's about
[2] my height. Well, last time we all know that
[3] five, five and five, ten is pretty significant
[4] difference. But that's not going to stop Kyle
[5] Holman because he says, well, it's the ice in
[6] the driveway that caused me to think that he
[7] was five inches taller than he really is.
[8] Again if that was Johnnie Simmons and he was
[9] walking away from that area and he was walking
[10] toward his house he sure wasn't wearing the
[11] type of clothing that Charles Tolbert said the
[12] shooter was wearing and so now let's go get to
[13] Charles Tolbert's testimony.
[14] Charles Tolbert you recall that Detective
[15] Acerenza said, I brought the photographs in,
[16] this photoarray. That was marked already as
[17] C-10. I asked Charles Tolbert if he could
[18] identify and point to anybody in there that may
[19] have been involved. The detective said so he
[20] pointed to I think he said number six, Johnnie
[21] Simmons' photograph. He was asked a question,
[22] the detective, well, why did you just give him
[23] the photograph initially and ask him. The
[24] detective's response was, well, I didn't want
[25] them to mess around with the photoarray. I

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[1] he's questioned how about the second photograph
[2] and everything like that. He said, I was
[3] scared. Does that make a whole lot of sense to
[4] you, I'm scared, so I'm going to circle two
[5] photographs. It makes no sense whatsoever,
[6] ladies and gentlemen. But we go from the
[7] answer, no, I've never seen this person before
[8] to now we get a question by the detective a
[9] couple after that, I showed you a photoarray
[10] where they photographed, did you see the person
[11] that shot you in the photoarray? Answer: I
[12] think the one in the bottom is the one that
[13] shot me. Now that I think about it his name is
[14] Johnnie. I think he's the one that shot me.
[15] Out of the blue he just as he's in bed there
[16] hours after being shot five times out of the
[17] blue suddenly he realizes. Did I just tell you
[18] I never saw that person before. Not only had I
[19] not seen him before, but I know his name and he
[20] was the young boy that has been around for a
[21] few years. Just flip that switch and suddenly
[22] Charles Tolbert is on the same track of the
[23] anonymous phone call. What does he say,
[24] Charles Tolbert, when he comes to this person
[25] who I guess the suggestion would be that he's

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[1] wanted to see what they said first. So lo and
[2] behold the point of the fingering was suppose
[3] to be to Johnnie Simmons. What does Charles
[4] Tolbert do when he's handed the photograph and
[5] asked to circle that person, he circles two
[6] people. What is his response, Charles Tolbert,
[7] to the question like why did you do that? His
[8] response is, well, he may have been the guy
[9] also. That's the detective's testimony. Do
[10] you recall? One of the things in Charles
[11] Tolbert's statement that I suggest should give
[12] you pause as it relates to this case and this
[13] investigation is the metamorphosis, the big
[14] change from in a matter of a couple of pages.
[15] From Charles Tolbert's statement that don't
[16] know this guy Johnnie Simmons, never saw him
[17] before. Just so it's not only my recollection
[18] in page two of the exhibit, this is right after
[19] he's asked the question, can you describe the
[20] male that shot you. The answer was I said
[21] before that was somebody wearing beige or khaki
[22] set. It says not just pants, cargo khaki set
[23] or cargo set, tan or beige. So then the next
[24] question is, have you ever seen him before.
[25] What's Charles Tolbert's answer: No. Then

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[1] scared out of his boots, he says, he's not the
[2] guy that did it. I think it may have been
[3] number four. He says I'm not sending an
[4] innocent person to jail. I'm not telling you
[5] Johnnie Simmons was involved in the case. But
[6] we're still damning those torpedos. This is
[7] where we're going and this is what we have and
[8] this is all that genesis of all of this is an
[9] anonymous phone call. His Honor is going to
[10] tell you that the only purpose and the only
[11] reason you can hear that anonymous phone call
[12] was because that showed the basis for the
[13] police making an arrest of Johnnie Simmons.
[14] They didn't just pick Johnnie Simmons out of
[15] the blue, somebody gave them a name of Johnnie
[16] Simmons. Your Honor is also going to tell you
[17] that statement can't be used as evidence of
[18] guilt of Johnnie Simmons. That statement for
[19] all we know could have been made by the
[20] shooter. There's no reliability in that
[21] statement whatsoever. The only reason that
[22] it's before you is because it demonstrated why
[23] it is that Johnnie Simmons out of the blue got
[24] picked up. He doesn't match any descriptions.
[25] There's no witness saying that Johnnie Simmons

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[1] was the person inside the store or the person
[2] out on the street or the person that ran away.
[3] You might have evidence from Kyle Holman that
[4] Johnnie Simmons is the guy who was walking
[5] north toward Cheltenham Avenue minutes after
[6] the incident occurred as opposed to south
[7] toward Center City not on Duval Street, but in
[8] a driveway. You might have that evidence. You
[9] might have that evidence that it was Johnnie
[10] Simmons he wasn't wearing the clothing
[11] described by anybody in this case that the
[12] shooter was wearing silver pants, black hoodie.
[13] He got the works. How many people do you think
[14] in Philadelphia wear black hoodies. How many
[15] people do you think might have braids or corn
[16] rows in Philadelphia?

[17] We got a letter from Charles Tolbert and
[18] you heard evidence that we provided that letter
[19] to the district attorney from Charles Tolbert.
[20] That didn't just land on the district
[21] attorney's desk. That was provided by us. So
[22] why does Charles Tolbert say put a thousand
[23] dollars on my books and I'll be quiet or I
[24] won't testify against you and then still come
[25] in and say what he tells you is the truth that

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[1] case. You have to determine from all of the
[2] evidence presented who is worthy of my belief.
[3] That's the starting point. You have to decide
[4] in my every day world would I believe what this
[5] guy is trying to sell me. Because if you don't
[6] get past that then you don't even have to
[7] concern yourself with the burden of proof in a
[8] criminal prosecution because His Honor told you
[9] initially and will instruct you as to what that
[10] is. Because as Johnnie Simmons sits there and
[11] as every other accused individual in the county
[12] sits in that chair he has a presumption of
[13] innocence. You go in to deliberation giving
[14] Johnnie Simmons and any other accused one foot
[15] up in the game. He's presumed to be innocent.
[16] It's the Commonwealth by its evidence that has
[17] the burden of proving guilt in this and every
[18] other criminal prosecution beyond a reasonable
[19] doubt.

[20] Again, I'm jumping ahead past the
[21] evidence, but before I forget this, because I'm
[22] getting too old I guess, Johnnie didn't
[23] testify. And His Honor is going to tell you
[24] and you were told initially and in your
[25] questionnaires you all agreed I guess after

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[1] it wasn't Johnnie Simmons that shot him. Well,
[2] he says I'm a hustler. I think we know that.
[3] I think we know that he's in jail now. We know
[4] from Gerald Wright that he had just got out of
[5] jail when he was in the market for a cell
[6] phone. And we know that when he was arrested
[7] he had 38 bags of a green leafy substance on
[8] his possession. I'm a hustler. I'm looking to
[9] make money. Well, why the district attorney
[10] asked him would you say if you don't put that
[11] money on my books I'm going to come in and say
[12] that you're the shooter. Well, because in case
[13] I got jammed up with this thing I was going to
[14] say that he was the shooter. I wasn't going to
[15] be out there hanging on a limb trying to extort
[16] somebody for money so I would tell them the
[17] truth if they paid me. So I'm just going to
[18] say in my letter that the truth is that you
[19] shot me and if you don't pay me the money I'm
[20] covered because I already said that in my
[21] letter. This is the type of person that you
[22] would rely upon for what? What does Charles
[23] Tolbert might tell you would you take to the
[24] bank as being worthy of belief. That's what
[25] this is all about. You're fact finders in this

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[1] learning the law you did initially that you
[2] can't draw any adverse inference against the
[3] person and accused for not testifying. That
[4] makes perfect sense for any number of reasons
[5] if we look at the logic involved. The
[6] Commonwealth has the burden of proving guilt
[7] beyond a reasonable doubt. So if the defense
[8] has no burden how could you hold it against the
[9] defense for not going forward with any
[10] evidence. They don't have a burden to prove
[11] anything. So doesn't it logically make sense
[12] that a person who stands accused and doesn't
[13] have to present any evidence that you shouldn't
[14] hold it and the law says you can't hold it
[15] against the person for not doing that. No. He
[16] has a right like everybody to stand here and
[17] say you're bringing this case against me,
[18] you're challenging me based upon this evidence,
[19] you prove this to a jury of peers beyond a
[20] reasonable doubt and I'll live with their
[21] verdict whatever it is.

[22] So we've got the five to seven minute
[23] embrace by Johnnie Simmons' mother. I don't
[24] want to beat a dead horse, but we've already
[25] been down the road in terms of what five

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[1] minutes encompasses, let alone five to seven.
[2] When I asked I honestly don't recall which one,
[3] whether it was Officer Alexander or Officer
[4] Long. They were both on target. One said five
[5] minutes and one said seven. I said kind of
[6] like really five minutes. Yeah, five minutes.
[7] Now, if you had the opportunity to see what
[8] five minutes is and how much hot air I can give
[9] you in five minutes you think an embrace
[10] outside took five minutes. Wouldn't you think
[11] it was more consistent with what Gerald Wright,
[12] the guy who's sitting around here for how many
[13] days now so he can tell you what was involved
[14] out there. You think it's more consistent with
[15] what he said occurred. What's that all about
[16] again that's one of the rings. The ring here
[17] that we're supposed to be focused on is did
[18] Johnnie Simmons shoot Charles Tolbert and are
[19] you convinced beyond a reasonable doubt on
[20] that. I'm not faulting anybody, if I was
[21] prosecuting the case maybe I'll throw that
[22] stuff out there too but it may be relevant if
[23] you think there's some legs on that testimony
[24] about five minute embraces and everything like
[25] that well maybe you should hear that. But I'm

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[1] the opportunity to address you. But back again
[2] to the address I have when you were in the jury
[3] selection room there were some people that were
[4] in that jury room that was sent out to civil
[5] courtrooms over in City Hall. Obviously you
[6] folks came up to the Criminal Justice Center
[7] and you were selected to sit on this jury.
[8] There are different burdens of proof involving
[9] various types of litigation. In a civil
[10] prosecution generally a civil prosecution will
[11] be the type where I'm involved in an automobile
[12] accident. I hit you and because I went through
[13] a light you got injured. So you're going to
[14] sue me because you're saying I breached a duty
[15] to you, a duty of care, and I was negligent and
[16] any negligence caused you injuries and you
[17] should be compensated for that. These people
[18] maybe you were sharing coffee with down there
[19] before you got selected and they may be over in
[20] City Hall right now listening to one of those
[21] types of cases. In those types of cases you
[22] have a plaintiff which would be the moving
[23] party, that would be the Commonwealth
[24] counterpart, then you have a defendant.
[25] There's still a defendant in a criminal case.

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[1] going to suggest to you that that's ridiculous.
[2] We got that in there and then we have the
[3] intimidation factor in here. Everybody is
[4] intimidated. I'm not blaming anybody if they
[5] are intimidated in this kind of a case. If
[6] somebody is being shot down the street from
[7] where I live I might be a little afraid. My
[8] fear may have no basis whatsoever in reality,
[9] but if that's who I am I'm not faulting anybody
[10] for that. But what does that have to do with
[11] the price of eggs. Nothing, ladies and
[12] gentlemen, nothing at all with regard to
[13] description. What evidence is there of Johnnie
[14] Simmons as being involved in this shooting.
[15] Nothing.

[16] When you are down in that jury
[17] deliberation room this is what's going to
[18] happen. There will be 30 other things that
[19] when I sit down I'm going to say, geez, I can't
[20] believe I forgot to mention this. The problem
[21] is I guess or the reality is, it might not be a
[22] problem, once I sit down I can't get back up so
[23] that's kind of why I just need to throw out to
[24] you whatever I can. The rules say that I
[25] address you first and then the Commonwealth has

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[1] So then the court will instruct the jury at the
[2] conclusion of the evidence. As a fact finder
[3] you believe that the plaintiff, the moving
[4] party, has met its burden ever so slightly. If
[5] you find that the plaintiff has proven its case
[6] by a preponderance of the evidence, tip the
[7] scales, then your verdict should be for the
[8] moving party, the plaintiff. That's what the
[9] burden would be for those people before you who
[10] were selected down here. Then you have a
[11] prosecution where for example the state
[12] attempting to take a child from its mother
[13] saying that the mother is not fit and the
[14] child's best interest is to serve as a ward of
[15] the state. In that type of prosecution the
[16] moving party will be a representative of the
[17] Commonwealth they would have the burden of
[18] proving not just tipping the scales by a
[19] preponderance of the evidence, but they would
[20] have a burden of proving by what's known as
[21] clear and convincing evidence that that child's
[22] interests are better served as a ward of the
[23] state than with its parent. In a criminal
[24] prosecution in this country where the
[25] Commonwealth is attempting to deprive a citizen

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[1] of his or her liberty for even a day the
[2] Commonwealth has to prove guilt beyond a
[3] reasonable doubt. His Honor will tell you
[4] that's the kind of doubt that would cause a
[5] reasonable person to hesitate when they were
[6] acting in matters that were important in their
[7] lives. It's a doubt that arises from the
[8] evidence or from the lack of evidence in a
[9] case. It's not a doubt that you make up. I'm
[10] going to suggest to you that you don't have to
[11] make anything up in this case to have a
[12] reasonable doubt. I'm going to suggest to you
[13] that when you view the testimony of the
[14] witnesses that were presented, when you look at
[15] the script or recall the script that was drawn
[16] between Officer Long and Detective Acerenza
[17] when you see that really the only evidence in
[18] this case is something that you can't even
[19] consider for purposes of guilt which is an
[20] anonymous call, yes, did Charles Tolbert at one
[21] point in life say Johnnie Simmons was the guy,
[22] yeah, but he brings a little bit of baggage
[23] with him. How many times do you think somebody
[24] circles two photographs and says it may have
[25] been him too. I'm going to suggest to you that

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[1] when you go back to that jury room to
[2] deliberate in order to reach a verdict in this
[3] case in any criminal case on any charge the
[4] verdict has to be unanimous. That means all 12
[5] members of the jury have to agree. To find
[6] someone guilty you have to be convinced, all 12
[7] jurors, beyond a reasonable doubt that the
[8] person is guilty. To find someone not guilty
[9] you have to not be convinced beyond a
[10] reasonable doubt that that person was guilty.
[11] We all want you to reach a verdict in this
[12] case. We don't, any of us, want you to reach a
[13] verdict based upon horse trading. The court
[14] will give you instructions concerning how you
[15] deliberate. If you deliberate in this case and
[16] your views are different than your fellow
[17] jurors and you can't reconcile what you recall
[18] the evidence to be with what they recall the
[19] evidence to be or vice versa, you don't
[20] compromise your findings that's whether you're
[21] in a majority or in a minority solely for the
[22] purpose of reaching a unanimous verdict in a
[23] case. You listen to the views of other jurors.
[24] If you think after listening to their views
[25] that you're wrong you change your view

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[1] you got a reasonable doubt before you get past
[2] ten of 10:00 on February 28th based upon that.
[3] I want to again thank you. I'm confident
[4] that you will continue with your thoughtful
[5] attention and deliberations through the Ms.
[6] Forchetti's remarks and the court's charge, Ms.
[7] Forchetti, excellent lawyer. I'm confident that
[8] after she addresses you she's going to raise
[9] certain questions. They're going to have a
[10] different spin on it than maybe I suggest to
[11] you the evidence shows or doesn't show. You
[12] can beat that as I sit there I love to have the
[13] opportunity to come up and rebut whatever those
[14] suggestions are, as I said to you, I can't do
[15] it, but I'm going to rely on your good common
[16] sense and your intelligence and your focus on
[17] the evidence that was presented in this case to
[18] answer those questions or queries on my behalf
[19] and on the behalf of Johnnie Simmons. Again,
[20] thank you. On behalf of Johnnie and personally
[21] I trust that you'll reach a verdict in this
[22] case that is fair. Not only to the
[23] Commonwealth, but also to Johnnie Simmons. And
[24] as I'm almost done but as I say that, ladies
[25] and gentlemen, His Honor will tell you that

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[1] certainly because now you've made a conscious
[2] decision that your views were wrong. But if
[3] after deliberating you're still convinced that
[4] your views are correct and the other jurors
[5] views are incorrect you don't surrender your
[6] beliefs solely to reach a verdict in this case.
[7] That's the law. Nothing more than anyone would
[8] expect, nothing less than anyone would expect.
[9] Certainly the rules that we're governed by and
[10] that's the law even if at some point, and I'm
[11] not asking you to not reach a verdict, believe
[12] me and I'm sure Ms. Forchetti is not, but
[13] that's the law even if you can't reach a
[14] unanimous verdict on the charges.
[15] Again, I thank you. You served in an
[16] excellent capacity so far. And believe me
[17] there are jurors that are half asleep for most
[18] of a trial and I certainly haven't observed
[19] that as being the case in this instance. So I
[20] thank you for that and I'm confident that when
[21] you follow the instructions that the court
[22] gives you that you'll reach a verdict in this
[23] case that will vindicate Johnnie Simmons
[24] because of the Commonwealth's having failed to
[25] meet its burden of proof. Thank you.

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[1] **THE COURT:** Thank you, Mr. Lorusso.
[2] Ms. Forchetti, you may address the jury.
[3] **MS. FORCHETTI:** Thank you. Good afternoon
[4] everyone. Is everyone okay, does anyone need a
[5] break?
[6] Do you see what's going on here? Have you
[7] seen that in this trial; what happened on
[8] February 4th was street justice. Charles
[9] Tolbert did someone wrong and he was marked.
[10] He was out for less than a month before he was
[11] gunned down in the street in broad daylight.
[12] What does that tell you? That arrogance of
[13] Johnnie Simmons to gun Charles Tolbert down in
[14] broad daylight on a Friday afternoon in the
[15] middle of a busy street. Johnnie Simmons was
[16] trying to kill Charles Tolbert. Charles
[17] Tolbert was supposed to be dead. Six holes in
[18] him. Charles Tolbert was supposed to be dead
[19] and no one was going to say boo about Johnnie
[20] Simmons being the shooter. That's what was
[21] supposed to happen. That's what was supposed
[22] to happen that day as Charles Tolbert would
[23] have been dead and all of those neighbors
[24] wouldn't have said a word about who did it.
[25] Wouldn't have had the courage to come forward

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[1] shooting until he was told you're going to have
[2] to go on record, we're going to put your name
[3] on a piece of paper and you're going to come
[4] down to the station. Then all of a sudden
[5] Gerald changed his whole game. Not that he
[6] couldn't identify anyone but that he wouldn't.
[7] That's what he told you from the stand, that he
[8] wouldn't identify anyone. What did he tell you
[9] when he first took the stand. He told you he
[10] didn't know him. He said, I don't know the
[11] defendant. Never saw him before. Then after
[12] Little Johnnie's mother follows him out after
[13] he finishes testifying to thank him for his
[14] testimony. Why is she thanking him for his
[15] testimony, because it changed. It changed
[16] because when he talked to the police about the
[17] guy that he saw coming into the store he
[18] described him as a short guy. Described him as
[19] lighter complected. What did he tell you,
[20] ladies and gentlemen, he made him taller. He
[21] made him darker. He altered his testimony.
[22] That's why she was thanking him. So he comes
[23] back in here today to try and explain it away
[24] and admits, well, I do know Johnnie. I know
[25] Little Johnnie from the neighborhood. Gerald

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[1] because Johnnie Simmons and his boys have so
[2] much juice in that neighborhood that that
[3] neighborhood is terrified of him. The only
[4] people willing to come forward because they
[5] didn't really want Johnnie Simmons to get away
[6] with it, they didn't want Little Johnnie to
[7] kill someone out on the street and not face the
[8] consequences of it. The only people who would
[9] speak were anonymously under anonymous
[10] conditions. The police officers wanted to
[11] protect the identity of those people. That's
[12] why Officer Long couldn't tell you who gave him
[13] that information and that information was just
[14] a tool, just an investigative tool to point
[15] them in the right direction to lead them
[16] towards the evidence and lo and behold all
[17] paths pointed back to Little Johnnie.
[18] Gerald Wright was cooperative until he was
[19] told you have to come down to the station to
[20] give a statement. What did Officer Long tell
[21] you, at that point he backed up, whoa, whoa,
[22] whoa, I'm not making any kind of statement. I
[23] don't want to come down. Why did the officers
[24] come by with Little Johnnie to Gerald? Because
[25] Gerald had held himself out as a witness to the

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[1] Wright didn't have the courage to tell you what
[2] he knew. And can you blame him. Every person
[3] that has identified Johnnie has had to be
[4] relocated by my office. The consequences, the
[5] specter of what could happen to a witness that
[6] has the courage to come forward are very real,
[7] ladies and gentlemen. The courage of Kyle
[8] Holman and the courage of Charles Tolbert are
[9] not to be overlooked. Charles Tolbert lying in
[10] that hospital bed with a big open wound to his
[11] stomach with a bullet lodged close to his heart
[12] says to the detective, I'm scared I'm not going
[13] to make it. Charles Tolbert thinks that his
[14] opportunity for revenge for street justice
[15] isn't going to come to him. So he doesn't want
[16] Johnnie to get away with it. So he tells the
[17] police however reluctantly what happened that
[18] day. As he talks it comes out more and more.
[19] Well, this is what he looks like. No, I don't
[20] know. Okay, I do know him. I know Little
[21] Johnnie from the neighborhood. He's one of the
[22] boys coming up in the neighborhood and
[23] identifies him. But when he's handed that pen
[24] that fear of what he just said hitting him like
[25] a ton of bricks he realizes I'm putting my name

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[1] to paper and I'm coming forward on this. I'm
[2] vulnerable lying here in this hospital bed.
[3] I'm vulnerable because my family still lives in
[4] that neighborhood. His courage falters ever so
[5] slightly. He quickly circles that other
[6] picture. What does Detective Acerenza tell
[7] you, that that has never happened in his
[8] career, in all the years, in all the shootings
[9] that he's investigated, hundreds of them, that
[10] was so notable to him that he made a note of
[11] it. And if this were really some kind of frame
[12] up job like the defense is asking you to
[13] believe don't you think Detective Acerenza if
[14] he was willing to stake his career on who shot
[15] Charles Tolbert would have buried that array,
[16] would have put together a new array, would have
[17] manufactured some evidence. Because that's
[18] what the defense is asking you to believe.
[19] That Detective Acerenza is willing to stake his
[20] career, stake his pension, stake his
[21] credibility because someone shot a two-bit thug
[22] like Charles Tolbert. That's not what happened
[23] here. What happened here is that Little
[24] Johnnie shot Charles Tolbert and he had the
[25] courage enough to say it. But he didn't say it

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[1] Leland Kent. And then less than a month before
[2] we start meeting for trial he sends a letter to
[3] Little Johnnie, postmarked October 13th, and
[4] he's offering to purger himself. And then what
[5] happens, he tells us what he's going to do in
[6] this letter. He gives you the game plan.
[7] Getting on the stand ain't my twist. He tells
[8] you that. He says just tell me who did it.
[9] Tell me who told you to shoot me because you
[10] and I don't have any kind of beef. That's what
[11] he says. You thought you killed me, didn't
[12] you? That's what he says to Little Johnnie.
[13] What was Charles Tolbert's reaction when I read
[14] this letter to him? He was upset. He was
[15] angry. He said that was between me and him.
[16] He never thought that this letter would see the
[17] light of day. The defense had no idea, no one
[18] had any idea that Charles Tolbert was going to
[19] go south because he was cooperative.
[20] You heard every officer testify. You
[21] heard Mr. Kent testify that he was cooperative
[22] up until he took that witness stand. But he
[23] told you what he was going to do right here.
[24] You want this shit up off you then you need to
[25] be straight up with me, Little Nigga. I know

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[1] just once when he was interviewed. He said it
[2] again when he came in court. He testified. He
[3] took an oath and got up on that witness stand
[4] and pointed to him, not once, not twice, three
[5] times over the course of testimony. That's
[6] him. I'm a 109 percent sure. I don't forget
[7] faces. That's what he said.

[8] The judge is going to charge you on the
[9] law because you see the law recognizes that
[10] witnesses sometimes lose courage when it comes
[11] to taking the stand. Sometimes they're so
[12] scared they have to face the consequences of
[13] pointing out someone that hurt them because
[14] they're afraid of that person. The judge will
[15] tell you that this testimony is substantive
[16] evidence. And what that means is that evidence
[17] is as real as if it's speaking to you from the
[18] witness stand. That Charles Tolbert's prior
[19] testimony you can rely on as real evidence.
[20] The fact that he came into court and pointed
[21] out Johnnie Simmons that that's real. That's
[22] not imaginary. He did that on that day. He
[23] was cooperative on February 8th. He was
[24] cooperative on April 26th when he testified.
[25] He was cooperative every time he talked to

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[1] you don't want to sit in jail. But I can be a
[2] dick head and keep you there. You want to be a
[3] killer, huh. Ha ha. Well, option number two
[4] is you can turn down this offer and go to
[5] trial. I got a bullet in my back and my hip.
[6] I also got a colostomy bag. It says testifying
[7] ain't in my blood. Like I said I lost drugs
[8] and money from the police when your dumb ass
[9] shot me. Look, you got until November 1st to
[10] get a stack put into my account and a letter
[11] saying who sent you at me. The choice is
[12] yours. Time is ticking. I know you want out
[13] of there. I want you out of there. I don't
[14] ever want to shoot you back. I just want to
[15] beat you the fuck up. That's what he says to
[16] Little Johnnie. He wants to take this back to
[17] the streets, get it out of the courts. So is
[18] it any surprise that he comes in and tries to
[19] say no, that's not him. Tries to use the magic
[20] words, I don't want an innocent man to go to
[21] jail. None of us believe that Little Johnnie
[22] is innocent. The question for you all to
[23] decide and the only question, there are no mini
[24] trials here. There is one question to answer
[25] and that is did Little Johnnie shoot Charles

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[1] Tolbert. That's it. That's the question I
[2] need you to answer. That's what I want you
[3] focussed on. Every little bit of evidence in
[4] this case when you add it up tells you that,
[5] yes, he did.

[6] Now, the judge is going to instruct you on
[7] direct and circumstantial evidence. He's going
[8] to tell you that circumstantial evidence can be
[9] enough to convict someone beyond a reasonable
[10] doubt. But you don't need a video, that you
[11] don't need DNA, that you don't need
[12] fingerprints. When you add up all those little
[13] bits and pieces if they convince you beyond a
[14] reasonable doubt that Johnnie Simmons is the
[15] one that shot Charles Tolbert then you have to
[16] convict him. There's a lot of circumstantial
[17] evidence in this case.

[18] He is in the neighborhood when it happens.
[19] Kyle Holman sees him running, sees him speeding
[20] up when the sirens are heard, running away from
[21] the scene of the crime within two minutes of
[22] the shots being fired. Right on that ice with
[23] his hands in his hoodie which kind of tells me
[24] that's kind of weird because why would you be
[25] running on ice with hands in your pockets. Do

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[1] to the movie theater. Rainy Friday night. I
[2] had my hair pulled back in a ponytail. I was
[3] wearing a hoodie. The cashier asked me for
[4] identification because I was seeing a rated R
[5] movie. She wanted to make sure that I was over
[6] the age of 18. I laughed at her and I said,
[7] thank you, you made my day. She was six inches
[8] from me and yet if she had been asked to
[9] describe me she would have described me in my
[10] late teens early 20s. I appreciate the
[11] compliment but she would have been wrong but
[12] does that mean she wouldn't have recognized me
[13] if she had seen me again. Description is only
[14] a tool. There was no doubt in Kyle Holman's
[15] mind that he recognized Little Johnnie. No
[16] doubt at all. He was describing him on the
[17] phone as he's running by to the police because
[18] he thinks it's unusual. He had no idea about
[19] what was going on with Charles Tolbert. He
[20] just thought it was strange that after hearing
[21] gunshots he sees this young guy running down
[22] the ice with his hands in his pocket. So he's
[23] trying to be a good citizen so he calls the
[24] police and he's describing him. He gets his
[25] height wrong. Does that mean he didn't

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[1] you think maybe he was holding a gun in there?
[2] That gun was long gone before the police even
[3] stopped him in the barbershop. The gun was
[4] disposed of, that's a criminal law 101, get rid
[5] of the gun, get rid of any physical evidence
[6] that will tie you to the crime. The gun is
[7] gone. His outfit is changed. He's wearing
[8] something completely different. Counsel
[9] focussed a lot on the clothes described in this
[10] case. Why do defense attorneys love
[11] descriptions because they are so often wrong.
[12] See because description is merely a tool. It's
[13] a tool to get you to recognize someone whether
[14] or not you describe someone accurately means
[15] nothing if you don't recognize the person. Let
[16] me ask you how many people know how much a
[17] dollar bill weighs. Does anyone? How many
[18] ounces? Less than an ounce. How long is a
[19] dollar bill? How wide is it? How many times
[20] does the word "one" appear on the dollar bill?
[21] Do any of you know? But how many of you would
[22] tell me that you don't recognize this. Every
[23] single one of you recognizes this. There is a
[24] vast gulf between description and recognition.
[25] I give you another example. Last year I went

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[1] recognize him. Think about the consequences of
[2] Kyle Holman recognizing Little Johnnie. Do you
[3] really think he wanted to recognize him?
[4] Having to relocate his family, to pack up and
[5] leave the house that he loves. No. He did it
[6] because that's right. That was the truth. He
[7] was doing his duty. He recognized him because
[8] that's who he saw. That is another piece of
[9] circumstantial evidence tying Johnnie Simmons
[10] to the shooting. It's not merely a coincidence
[11] that Kyle Holman sees him running away, away
[12] from the direction of the shooting towards his
[13] house. Kyle Holman has no horse in this game.
[14] Has nothing to gain by recognizing him. Has a
[15] lot to lose by recognizing him. But he
[16] recognizes him. And he comes in and he tells
[17] you that's him. I'm completely certain.
[18] The detectives and officers in this case
[19] have nothing to gain by arresting Johnnie
[20] Simmons. They are simply following the
[21] evidence. How do we know that the officers are
[22] merely doing their jobs? Look at the
[23] investigation into Kalif Collins. There is
[24] someone that Charles Tolbert identified as I
[25] think that's the setup man. Detective Acerenza

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[1] looks into it, doesn't find enough evidence,
[2] doesn't find enough corroboration. So he
[3] doesn't arrest him because it's the right
[4] responsible thing to do. Just pointing someone
[5] out in and of itself is not enough. That's
[6] what the detective tells you. We don't have
[7] any evidence of Little Johnnie knowing Kalif
[8] Collins. We don't have any evidence of any of
[9] the other witnesses who talk about the second
[10] guy of their recognizing Kalif Collins. So he
[11] may have been the person that lured Charles
[12] Tolbert out there so he can get shot in the
[13] street but we don't know. The investigation
[14] into Johnnie Simmons took many paths. But all
[15] of those paths lead back to him. That's how
[16] you can know that we have the right guy.

[17] Look, I'm not asking you to invite Charles
[18] Tolbert over to your house or have dinner with
[19] him or Facebook friend him. I'm not asking you
[20] to do any of those things. Charles Tolbert is
[21] who he is. He told you he's a thug. He's a
[22] criminal. But that's who Johnnie Simmons chose
[23] to shoot that day. He had a motive to do so.
[24] But that doesn't mean that Charles Tolbert can
[25] be gunned down in the street and we're going to

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[1] to the police and make an identification.
[2] Charles Tolbert wanted you to hate him, wanted
[3] you not to believe him. He was working at it.
[4] He was trying to get you to, don't believe me,
[5] don't listen to me, because he wants to handle
[6] this out on the street. Don't you dare let
[7] that happen. Because when you look at the
[8] evidence in this case this evidence convinces
[9] you that Little Johnnie shot him. Don't you
[10] dare take the easy way out and say I want
[11] fingerprints, I want a video. The question is
[12] not about what you want in terms of evidence.
[13] If I had that Johnnie would have pled guilty on
[14] Monday and I would have been out Christmas
[15] shopping. The evidence is about what you have
[16] and what you have is enough. What you have is
[17] Charles Tolbert's in-court identification.
[18] What you have is his photographic
[19] identification. What you have is his prior
[20] testimony against him. What you have is the
[21] letter that he wrote. This says it all. This
[22] letter says everything. Because he thought
[23] this was private. These are his own private
[24] thoughts. We get a glimpse into the mind of a
[25] common street thug. And not for one minute

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[1] just let it happen, just going to let him walk
[2] by. We're going to let Johnnie walk because
[3] Charles Tolbert is not a savory person. That's
[4] not justice. In Philadelphia we don't allow
[5] shooters to get away with it because they shoot
[6] other criminals. That's not how it works.
[7] That's the company that Johnnie Simmons keeps.
[8] One of the young boys in the neighborhood
[9] coming up that's how Charles Tolbert says he
[10] knows him. So the fact that Charles Tolbert is
[11] not a very nice person doesn't make him any
[12] less of a victim. The law protects us all.
[13] His word is not worth any less because he has a
[14] criminal background. We didn't hide that from
[15] you. I didn't try to build him up and make him
[16] more than what he was. He is who he is. And
[17] he also saw what he saw. As close as the court
[18] reporter and I are to each other is the
[19] distance that Johnnie Simmons says or that
[20] Charles Tolbert says Johnnie Simmons was to him
[21] when he shot him. Nothing in the way between
[22] them, just bam, bam, bam, bam, left him to die.
[23] Thought he was going to die. But it's only
[24] because of the excellent medical care that he
[25] received that Charles Tolbert was able to speak

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[1] does he ever say that anyone other than Johnnie
[2] shot him. Yo, I'm going to make this nice and
[3] clear for you. For one I'm going to say that
[4] was some nut shit you did. Right there. Right
[5] in the very opening lines of the letter. If
[6] they come up here and do this I won't testify
[7] on you in court. I will let you back out and
[8] keep it street. So Charles Tolbert is asking
[9] you to keep it street. And I'm telling you
[10] that your obligation as jurors is to keep it
[11] here in court. Don't let it go back to the
[12] street. This evidence here is enough. By
[13] telling Johnnie Simmons he's not guilty that's
[14] letting it go right back out into the street
[15] and letting this cycle continue.

[16] What happened on February 4th was a
[17] cold-blooded shooting. The evidence demands
[18] that you call it as such. He's charged with
[19] attempted murder, Johnnie Simmons. That
[20] requires a specific intent to kill. Now, he
[21] didn't need to sit there and draw out a game
[22] plan and map it all out. Specific intent to
[23] kill can be formed really, really quickly. The
[24] amount of time it takes you to decide to kill a
[25] bug. There's your specific intent to kill.

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[1] The judge will instruct you that aiming a
[2] deadly weapon such as a gun at a vital part of
[3] someone's body you can infer that there's a
[4] specific intent to kill. When you shoot
[5] someone between four and six times you're not
[6] just trying to scare them. You're trying to
[7] kill them, to eliminate them from the face of
[8] this earth.
[9] The defendant is also charged with
[10] aggravated assault, inflicting serious bodily
[11] injury. There is absolutely no dispute that
[12] remaining in the hospital for three weeks and
[13] receiving this type of medical treatment to
[14] generate over a thousand pages of medical
[15] records is anything but serious bodily injury.
[16] There's no dispute about that. The level of
[17] intent required there is knowingly,
[18] intentionally, or recklessly. When you fire a
[19] firearm at someone from three feet away you are
[20] knowingly or intentionally or even recklessly
[21] causing them serious bodily injury. Either you
[22] don't care how seriously injured they are, you
[23] want to cause serious bodily injury, and you
[24] actively try and do it. That's what happened
[25] in this case.

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[1] they could. They didn't want to come forward.
[2] They didn't want to give names, but they
[3] pointed the police in the right direction.
[4] Kyle Holman gave you what he could. Gerald
[5] Wright, I don't think he gave you what he
[6] could, but I think it's been pretty well
[7] established that he had some motive going on,
[8] some bias as to why his testimony was changed,
[9] was altered, was not what it could have been
[10] however much he tried to shy away from it.
[11] So this is not a perfect case, may not
[12] have all the evidence you want, but it's
[13] enough. That feeling in your gut that you know
[14] Johnnie Simmons is the shooter here that's
[15] beyond a reasonable doubt where you just know
[16] that he did it. Same as you make any other big
[17] decision in your life, buying a house. You
[18] look at a house, it's in the right
[19] neighborhood, the right school district, the
[20] neighbors seem really nice. Maybe the
[21] wallpaper in the kitchen is really ugly and the
[22] toilet runs when you flush it. That house may
[23] not be perfect, but is that enough. It has
[24] what you need. So you make that decision. You
[25] overcome that doubt. And you say, well, the

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[1] The defendant is charged with conspiracy.
[2] Meaning when that second guy, the setup guy, we
[3] don't need to prove who he is, just that the
[4] defendant acted with another person when they
[5] conspired together to lure Charles Tolbert out
[6] of that store onto the street that there was a
[7] conspiracy to commit either attempted murder or
[8] aggravated assault.
[9] The defendant is charged with unlawfully
[10] possessing a firearm. You heard he didn't have
[11] a license to carry. He's not allowed to have a
[12] firearm on the streets of Philadelphia.
[13] Therefore, in possessing one and using it to
[14] shoot Charles is illegal. Just possessing it
[15] was illegal.
[16] He's also charged with possessing an
[17] instrument of crime. That's when you use
[18] something, in this case a gun, to commit a
[19] crime. That's an instrument of crime, the gun
[20] becomes an instrument of crime. Not only is it
[21] used illegally, but it's used to commit a
[22] crime. the defendant is charged with that.
[23] All the witnesses in this case they gave
[24] you what they could. The neighbors gave you
[25] what they could. They gave the police what

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[1] house isn't exactly everything I wanted, but is
[2] that what I need. You make that decision. The
[3] decision you make to get married, to find
[4] someone you love and you want to spend the rest
[5] of your life with. Some people don't always
[6] make the right decision. But you ask those of
[7] us who are happy what it is. It's usually not
[8] one thing. It's usually not, oh, he's so
[9] fabulously handsome or she's so tremendously
[10] brilliant. It's a million tiny little things
[11] that when you add up give you the right answer
[12] that feeling in your gut you just know that
[13] what you're doing is right. When you look at
[14] the evidence in this case you just know that
[15] Johnnie Simmons is the shooter. You know
[16] because everything that you consider leads you
[17] back to him.
[18] Charles Tolbert's very reluctance to face
[19] Johnnie Simmons in court in this trial tells
[20] you that it's the right guy. That fear of
[21] facing him tells you that it's the right guy,
[22] that he didn't want to do it, that that courage
[23] failed him at the last minute. Luckily the
[24] detectives did a thorough job investigating and
[25] Charles Tolbert testified so openly before that

[1] that gives you the tools you need to come to
[2] the right verdict on this case.
[3] I'm asking you, I'm counting on all of you
[4] to have the courage to do what Kyle Holman did,
[5] to have the courage to do what Charles Tolbert
[6] did when they pointed at Johnnie Simmons,
[7] knowing about his cred in the neighborhood,
[8] knowing his posse, knowing about the
[9] consequences that they had the courage to say
[10] that's him. I'm asking all of you to have the
[11] courage to do what the evidence compels you to
[12] do and that's convict this defendant. Don't
[13] keep it street. Keep it here in the courtroom
[14] and you use that verdict, veredicto, to speak
[15] the truth, and call him what he is, guilty.
[16] Thank you.

[17] **THE COURT:** Thank you, Ms. Forchetti.
[18] Mr. Ferguson, make the appropriate
[19] announcement.

[20] ---
[21] (Court crier announced the
[22] commencement of jury instructions.)
[23] ---

[24] **THE COURT:** Ladies and gentlemen of the
[25] jury, now that all the evidence has been

[1] full attention despite the fact that I'm
[2] reading. As I've said, ladies and gentlemen,
[3] and it bears repeating you must accept and
[4] apply only the law in which I instruct you.
[5] You may not apply any other law which you know
[6] or think you know. If you jurors wish
[7] instructions in the law in addition to these
[8] that I give you presently or if at some later
[9] time you desire clarifications of these
[10] instructions then you may, through your
[11] foreperson, send an appropriate written request
[12] and I will accommodate you.

[13] As I mentioned at the outset, ladies and
[14] gentlemen, it is my responsibility as the
[15] presiding judge to decide all questions of law
[16] and you must accept and follow my rulings and
[17] instructions in matters of law. I am not,
[18] however, I am not the judge of the facts in
[19] this case. So it is not for me to decide what
[20] the facts are concerning the charges against
[21] this defendant. You jurors, the jury, is the
[22] sole judge. The jury is the only judge of the
[23] facts. So it will be your collective
[24] responsibility to weigh the evidence and based
[25] on that evidence and of course any logical

[1] presented in this case and the attorneys for
[2] both sides have made their closing arguments it
[3] becomes my duty to instruct you in the law
[4] which you must on your oath both accept and
[5] apply to the facts as you determine the facts
[6] to be in reaching your verdict. Now, in doing
[7] so in instructing you in the law I will be
[8] reading from a written charge as almost all
[9] judges do to make certain that what I'm telling
[10] you is in accordance with the law and is both
[11] standard and uniform. I advise you of this
[12] because there is a tendency not to pay close
[13] attention to anyone who is reading to you.
[14] However, because it's most important that the
[15] law in which I now instruct you be accurate and
[16] in accordance with the laws of this
[17] Commonwealth I will be reading. I give you
[18] those warnings and nevertheless ask you to pay
[19] full attention.

[20] If you understand that what I'm about to
[21] say for perhaps the next 30 minutes, 45
[22] minutes, will provide you with the tools that
[23] you need to make your decision in this case
[24] then you will understand the importance of what
[25] I have to say and the necessity for you to pay

[1] inferences which flow from that evidence you
[2] must determine the facts, apply the rules of
[3] law which I now impart to you to those facts,
[4] and then decide whether the defendant has or
[5] has not been proven guilty beyond a reasonable
[6] doubt to the charges made against him. In your
[7] determination of the facts you are to consider
[8] only the evidence which has been presented in
[9] this courtroom and again, of course, the
[10] logical inferences which have derived from that
[11] evidence. You are not to rely upon supposition
[12] or guess on any matters which are not in
[13] evidence. You should not regard as true any
[14] evidence which you find to be incredible even
[15] if it is uncontradicted. Your determination of
[16] the facts should not be based upon sympathy for
[17] or prejudice against either the defendant or
[18] the complainant nor on which attorney made the
[19] better speech nor on which attorney you liked
[20] better.

[21] Now, jurors, in the course of these
[22] instructions I may, but if I do so at all, it
[23] will be to a very limited extent, I may refer
[24] to some particular evidence in this case. I
[25] certainly do not propose to refer to all of the

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[1] evidence. I leave that to your recollection.
[2] Because as I said previously and it bears
[3] repeating it is your recollection and yours
[4] alone which must govern during your
[5] deliberations. So you are not bound by my
[6] recollection of the evidence nor are you bound
[7] by the recollection of the attorneys as
[8] expressed in their arguments. Nor are you to
[9] conclude that any evidence which I call to your
[10] attention or which the attorneys have already
[11] called to your attention is the only evidence
[12] which you should consider. You are fact
[13] finders in this case. It is your
[14] responsibility to consider all the evidence
[15] which you believe material when deliberating on
[16] your verdict.

[17] Ladies and gentlemen, a fundamental
[18] principle of our system of criminal law is that
[19] a defendant is presumed to be innocent. So the
[20] fact that Johnnie Simmons was arrested and is
[21] charged with crimes is not evidence of his
[22] guilt. Furthermore, the defendant is presumed
[23] to remain innocent throughout the trial unless
[24] and until you conclude based upon a careful and
[25] impartial consideration of the evidence that

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[1] sensible person to pause, hesitate, or refrain
[2] from acting upon a matter of highest importance
[3] in his or her own affairs or to his or her own
[4] interests. A reasonable doubt must fairly
[5] arise out of the evidence that was presented or
[6] out of the lack of evidence presented with
[7] respect to some element of each of the crimes
[8] charged. A reasonable doubt must be a real
[9] doubt. It may not be an imagined one nor may
[10] it be a doubt manufactured to avoid carrying
[11] out an unpleasant duty. So, ladies and
[12] gentlemen, to summarize, you may not find the
[13] defendant guilty based upon a mere suspicion of
[14] guilt. The Commonwealth has the burden of
[15] proving the defendant guilty beyond a
[16] reasonable doubt. If the Commonwealth has met
[17] that burden then the defendant is no longer
[18] presumed to be innocent and you should find him
[19] guilty. On the other hand, if the Commonwealth
[20] has not met its burden then you must find the
[21] defendant not guilty.

[22] You must consider and weigh the testimony
[23] of each witness and give it such weight as in
[24] your judgments it fairly entitled to receive.
[25] The matter of the credibility of the witness,

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[1] the Commonwealth has proven him guilty beyond a
[2] reasonable doubt to the charge made against
[3] him. It is not the defendant's burden to prove
[4] that he is not guilty. Instead it is the
[5] Commonwealth that always has the burden of
[6] proving each and every element of the charges
[7] charged and that the defendant is guilty of
[8] those crimes beyond a reasonable doubt. So a
[9] person accused of a crime is not required to
[10] present evidence or to prove anything in his
[11] own defense. If the evidence presented fails
[12] to meet the Commonwealth's burden then your
[13] verdict must be not guilty. On the other hand,
[14] if the evidence does prove beyond a reasonable
[15] doubt that the defendant is guilty of the
[16] crimes charged then your verdict should be
[17] guilty.

[18] Although the Commonwealth has the burden
[19] of proving that the defendant is guilty this
[20] does not mean that the Commonwealth must prove
[21] its case beyond all doubt or to a mathematical
[22] certainty. Nor must the Commonwealth
[23] demonstrate the complete impossibility of
[24] innocence. A reasonable doubt is the doubt
[25] that would cause a reasonably careful and

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[1] that is whether his or her testimony is
[2] believable and accurate in whole or in part is
[3] solely for your determination. As judges of
[4] the facts you are the sole judges of the
[5] credibility of the witnesses. This means you
[6] must judge the truthfulness and accuracy of
[7] each witness's testimony and decide whether you
[8] believe some, all, or none of that testimony.

[9] I shall mention factors which bear on that
[10] determination and which you may and should
[11] consider during your deliberations. They
[12] **include the following:**

[13] Whether the witness has an interest in the
[14] outcome of the case or has friendship or
[15] animosity toward other persons concerned in the
[16] case. The behavior of the witness on the
[17] witness stand and his or her demeanor, his or
[18] her manner of testifying and whether he or she
[19] shows any bias or prejudice which might color
[20] his or her testimony. The accuracy of his or
[21] her memory and recollection. His or her
[22] ability and opportunity to acquire knowledge of
[23] or to observe the matters concerning which he
[24] or she testifies. The consistency or
[25] inconsistency of his or her testimony as well

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[1] as its reasonableness or unreasonableness in
[2] light of all of the evidence in the case. If
[3] you conclude that one of the witnesses
[4] testified falsely and did so intentionally
[5] about any fact which is necessary to your
[6] decision in this case then, for that reason
[7] alone, you may, if you wish, disregard
[8] everything that the witness said. However, you
[9] are not required to disregard everything that
[10] the witness said for this reason. It is
[11] entirely possible that a witness may have
[12] testified falsely and intentionally in one
[13] respect but truthfully about everything else.
[14] If you find that to be the situation then you
[15] may accept that part of his or her testimony
[16] which you find to be truthful and which you
[17] believe and you may reject that part which you
[18] find to be false and not worthy of belief. If
[19] you find there were conflicts in the testimony
[20] you, the jury, you have the duty of deciding
[21] which testimony to believe. But you should
[22] first try to reconcile, that is fit together
[23] any conflicts in the testimony if you can
[24] fairly do so. Discrepancies in and conflicts
[25] between the testimony of different witness may

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[1] should consider all other factors which go to
[2] the reliability of their testimony. The
[3] important thing, jurors, is the quality of the
[4] testimony of each witness. You should also
[5] consider the extent to which conflicting
[6] testimony is supported by other evidence.
[7] Now, evidence may be of two different
[8] types in a criminal case. On the one hand
[9] there is direct evidence which is testimony by
[10] a witness from his or her own personal
[11] knowledge which is something he or she saw or
[12] heard himself or herself. The other type is
[13] circumstantial evidence which is testimony
[14] about facts which point to the existence of
[15] other facts which are in question. The example
[16] I use to illustrate circumstantial evidence
[17] **goes as follows:**
[18] Suppose you retire on a winter night and
[19] the streets were clear. And when you awoke
[20] snow was on the street and on the sidewalk and
[21] you saw footsteps in the snow. You would
[22] properly conclude that snow had fallen during
[23] the night although you didn't see it snowing,
[24] and that someone had walked in the snow
[25] although you saw no one walking in the snow.

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[1] or may not cause you to disbelieve some or all
[2] of their testimony. But you should remember
[3] that two or more persons witnessing an incident
[4] may see or hear it happen differently. Also it
[5] is not uncommon for a witness to be innocently
[6] mistaken in his or her recollection of how
[7] something happened. If you cannot reconcile a
[8] conflict in the testimony it is up to you to
[9] decide which testimony, if any, to believe and
[10] which to reject as not true or inaccurate. In
[11] making a decision consider whether the conflict
[12] involves a matter of importance to your
[13] decision in this case or merely some
[14] unimportant detail. And whether the conflict
[15] is brought about by an innocent mistake or by
[16] an intentional falsehood. You should also keep
[17] in mind, jurors, the other factors already
[18] discussed which go into deciding whether or not
[19] to believe a particular witness.

[20] In deciding which of conflicting testimony
[21] to believe you should not necessarily be swayed
[22] by the number of witnesses on either side. You
[23] should consider whether the witnesses appear to
[24] be biased or unbiased. Whether they are
[25] interested or disinterested persons, and you

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[1] That, jurors, is an example of circumstantial
[2] evidence. Whether or not circumstantial
[3] evidence is proof of the other facts in
[4] question depends in part on the application of
[5] common sense and human experience. In deciding
[6] whether or not to accept circumstantial
[7] evidence as proof of the facts in question you
[8] must be satisfied first, that the testimony of
[9] the witness who is presenting the
[10] circumstantial evidence is truthful and
[11] accurate; and second, that the existence of the
[12] facts the witness testifies to leads to the
[13] conclusion to the facts in question also
[14] happened.

[15] You, ladies and gentlemen, will recall in
[16] my preliminary instructions I told you
[17] statements made by the attorneys did not
[18] constitute evidence and therefore they were not
[19] binding on you. Thereafter, in the course of
[20] this trial an exception to this rule was
[21] brought to your attention. A stipulation is
[22] one such exception. There were stipulations in
[23] this case. The law is that when the
[24] Commonwealth and the defense stipulate, that is
[25] when they agree that certain facts are true

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[1] then their stipulation is evidence of that fact
[2] or those facts and you jurors should regard
[3] stipulated or agreed upon facts as proven. In
[4] their testimony Charles Tolbert and Kyle Holman
[5] have identified the defendant as the person who
[6] committed the crimes in this case. In
[7] evaluating their testimony in addition to the
[8] other instructions I have provided to you for
[9] judging testimony of witnesses you should
[10] consider the additional following factors:

[11] Did the witness have a good opportunity to
[12] observe the perpetrator of the offense? Was
[13] there sufficient lighting for him to make his
[14] observations? Was he close enough to the
[15] individual to know his facial and/or other
[16] physical characteristics as well as any
[17] clothing he was wearing? Has he made a prior
[18] identification of the defendant as the
[19] perpetrator of these crimes at any other
[20] proceedings? Was his identification positive
[21] or was it qualified by any hedging or
[22] inconsistencies? During the course of this
[23] case did the witness identify anyone else as
[24] the perpetrator. In considering whether or not
[25] to accept the testimony you should consider all

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[1] Johnnie Simmons. During which time he was
[2] photographed and thereafter released. Since
[3] that information was received from an anonymous
[4] source who did not testify in court you may not
[5] consider that testimony as evidence that
[6] Johnnie Simmons was, in fact, the person who
[7] shot Charles Tolbert. However, you may
[8] consider it to the extent that it may assist
[9] you in determining the basis for Johnnie
[10] Simmons, his initial arrests.

[11] There was evidence including the testimony
[12] of one Kyle Holman that tended to show that the
[13] defendant fled from the police. The
[14] credibility, weight, and effect of this
[15] evidence is for you to decide. Generally
[16] speaking, when a crime has been committed and a
[17] person thinks he is or may be accused of
[18] committing it and he flees, such flight is a
[19] circumstance tending to show the person is
[20] conscious of guilt. Such flight does not
[21] necessarily show consciousness of guilt in
[22] every case. A person may flee for some other
[23] motive and may do so even though innocent.
[24] Whether the evidence of flight in this case
[25] should be looked at as tending to show guilt

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[1] other circumstances under which the
[2] identifications were made. Furthermore, you
[3] should consider all other evidence relative to
[4] the question of who committed the crime
[5] including the testimony of any witness from
[6] which identity or non-identity of the
[7] perpetrator of the crimes may be inferred. You
[8] cannot find the defendant guilty unless you are
[9] satisfied beyond a reasonable doubt by all the
[10] evidence direct and circumstantial not only
[11] that the crimes were committed but it was the
[12] defendant who committed that crime or those
[13] crimes.

[14] In the course of this case there was
[15] testimony regarding an arrest after which a
[16] photograph of the defendant was taken and the
[17] defendant thereafter released and subsequently
[18] arrested again. In the course of this case
[19] there was testimony that an anonymous phone
[20] call was received by a police captain that the
[21] defendant Johnnie Simmons was the person who
[22] shot the complainant, Charles Tolbert. That
[23] testimony was presented not for the truth of
[24] its contents, but to show what may have been a
[25] reason or reasons for the initial arrest of

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[1] depends upon the facts and circumstances of
[2] this case and especially upon motives that may
[3] be prompted the flight. You may not find the
[4] defendant guilty solely on the basis of
[5] evidence of flight.

[6] You heard evidence that a witness, to wit,
[7] Charles Tolbert, may have made a statement on
[8] an earlier occasion that was inconsistent with
[9] his present courtroom testimony. That is for
[10] you to decide. As to any such prior
[11] inconsistent statement either given under oath,
[12] such as at a preliminary hearing or in writing
[13] and signed and adopted by the witness, you may,
[14] if you choose, regard this evidence as proof of
[15] the truth of anything that the witness said in
[16] the earlier statement. You may also consider
[17] this evidence to help you judge the credibility
[18] and weight of the testimony given by the
[19] witness at this trial. When you judge the
[20] credibility and weight of testimony you are
[21] deciding whether you believe the testimony and
[22] how important you think it is for the
[23] resolution of the issues before you.

[24] Ladies and gentlemen, it is entirely up to
[25] the defendant in every criminal trial whether

[1] or not to testify. A defendant has an absolute
[2] right founded on the Constitution to remain
[3] silent at trial. So you must not draw any
[4] inference of guilt or any other inference
[5] adverse to the defendant from the fact that he
[6] did not testify in this case.
[7] Members of the jury, the defendant in this
[8] case, Johnnie Simmons, is on trial before you
[9] having been charged with various offenses. And
[10] to each of these offenses the defendant has
[11] pled not guilty and elected to be tried by you,
[12] ladies and gentlemen of the jury. Specifically
[13] the defendant has been charged with attempted
[14] murder, aggravated assault, possession of an
[15] instrument of crime, violation of section 6106
[16] of the uniform firearms act and criminal
[17] conspiracy. Now, I have already instructed you
[18] jurors concerning the manner in which you
[19] should consider the evidence in this case and
[20] the general rules of law concerning the same.
[21] I must now instruct you on each of the specific
[22] charges made against the defendant, Johnnie
[23] Simmons.
[24] The first offense charged is attempted
[25] murder. The defendant Johnnie Simmons, has

[1] and conduct and the attending circumstances
[2] that may show his state of mind. If you
[3] believe that the defendant intentionally used a
[4] deadly weapon on a vital part of the
[5] complainant's body you may regard that as
[6] circumstantial evidence from which you may, if
[7] you choose, infer that the defendant had the
[8] specific intent to kill.
[9] So let me explain the meaning of a
[10] substantial step. A person cannot be guilty of
[11] an attempt to commit a crime unless he does an
[12] act that constitutes a substantial step toward
[13] the commission of that crime. An act is a
[14] substantial step if it is a major step toward
[15] the commission of a crime and also strongly
[16] corroborates the jury's belief that the person
[17] at the time he did the act and had a firm
[18] intent to commit that crime. An act can be a
[19] substantial step even though other steps would
[20] have to be taken before the crime can be
[21] carried out. If you are satisfied that the
[22] three elements of attempted murder have been
[23] proven beyond a reasonable doubt then you
[24] should find the defendant guilty of this
[25] offense. Otherwise you must find him not

[1] been charged with attempted murder. To find
[2] him guilty of this offense you must find that
[3] the following three elements have been proven
[4] **beyond a reasonable doubt:**
[5] First, that the defendant did a certain
[6] act, that is he shot the complainant Charles
[7] Tolbert.
[8] Second, that the time of this alleged act
[9] the defendant had the specific intent to kill
[10] Charles Tolbert, that is he had a fully formed
[11] intent to kill and was conscious of his own
[12] intentions.
[13] Third, that the act constituted a
[14] substantial step toward the commission of the
[15] killing the defendant intended to bring about.
[16] The specific intent to kill including
[17] premeditation does not require planning or
[18] previous thought or any particular length of
[19] time. It can be formed in an instant. All
[20] that is necessary is that there be time enough
[21] so that the defendant can and does fully form
[22] an intent to kill and is conscious of that
[23] intention. When deciding whether a defendant
[24] had the specific intent to kill you should
[25] consider all the evidence regarding his words

[1] guilty of attempted murder.
[2] The defendant Johnnie Simmons has been
[3] charged with aggravated assault. To find him
[4] guilty of this offense you must find that each
[5] of the following elements has been proven
[6] **beyond a reasonable doubt:**
[7] First, that the defendant caused serious
[8] bodily injury to the complainant, Charles
[9] Tolbert. Serious bodily injury is bodily
[10] injury that creates a substantial risk of death
[11] or that causes serious permanent disfigurement
[12] or protracted loss or impairment of the
[13] function of any bodily member or organ.
[14] Second, that the defendant acted
[15] intentionally or knowingly or recklessly under
[16] circumstances manifesting extreme indifference
[17] to the value of human life. A person acting
[18] intentionally with respect to serious bodily
[19] injury when it is his conscious object or
[20] purpose to cause such injury. A person acts
[21] knowingly with respect to serious bodily injury
[22] when he is aware that it is practically certain
[23] that his conduct will cause such a result. A
[24] person acts recklessly with respect to serious
[25] bodily injury when he consciously disregards a

[1] substantial and unjustifiable risk that serious
[2] bodily injury will result from his conduct.
[3] The risk must be of such a nature and degree
[4] that considering the nature and intent of the
[5] defendant's conduct and the circumstances known
[6] to him it's disregard involves a gross
[7] deviation from the standard of conduct that a
[8] reasonable person would observe in the
[9] defendant's situation. It is shown by the kind
[10] of reckless conduct which a life threatening
[11] injury is almost certain to occur.

[12] If after considering all of the evidence
[13] you find that the Commonwealth the evidence
[14] just stated beyond a reasonable doubt then you
[15] should find the defendant guilty of aggravated
[16] assault. Otherwise, you must find him not
[17] guilty of this crime.

[18] Johnnie Simmons is charged with possession
[19] of an instrument of crime. In order to find
[20] the defendant guilty of possessing a criminal
[21] instrument as charged in this case you must be
[22] satisfied that the following three elements
[23] have been proven beyond a reasonable doubt:

[24] First, that the defendant possessed a
[25] certain item, that is a firearm. For a person

[1] defendant guilty of possession of an instrument
[2] of crime. Otherwise you must find him not
[3] guilty of this offense.

[4] The defendant has been charged with
[5] violating section 6106 of the uniform firearms
[6] act which prohibits carrying a firearm without
[7] a license. To find the defendant guilty of
[8] this offense you must find that each of the
[9] following elements have been proven beyond a
[10] **reasonable doubt**:

[11] First, that the defendant carried a
[12] firearm concealed on or about his person. A
[13] firearm is any pistol or revolver with a barrel
[14] length less than 15 inches. Shotgun with a
[15] barrel less than 18 inches. Rifle with a
[16] barrel less then 16 inches or any pistol,
[17] revolver, rifle, or, shotgun with an overall
[18] length of less than 26 inches. To be a firearm
[19] the specific object charged must be capable of
[20] firing a projectile.

[21] Second, that the defendant was not in his
[22] place of abode, that is his home, or his fixed
[23] place of business at the time of the crime.

[24] Third, that the defendant did not have a
[25] valid or lawfully issued license for carrying

[1] to possess an item he must have the power to
[2] control and the intent to control that item.

[3] Second, that the item was an instrument of
[4] crime. An instrument of crime is anything
[5] specially made for criminal use or anything
[6] specially adapted for criminal use or anything
[7] that is used for criminal purposes and
[8] possessed by the defendant at the time of the
[9] alleged offense under circumstances not
[10] manifestly for lawful uses it may have. That a
[11] thing could somehow facilitate the possible
[12] commission of a crime is not enough. To be an
[13] instrument of crime the thing must be something
[14] the defendant would need to use in the
[15] commission of the underlying offense.

[16] Third, that the defendant possessed the
[17] item with the intent to employ it criminally,
[18] that is with intent to attempt or to commit a
[19] crime with it. The Commonwealth has charged
[20] here that the crime the defendant intended to
[21] commit with the instrument alleged was assault
[22] and/or murder. If after considering all of the
[23] evidence you find that the Commonwealth has
[24] proven the elements just stated beyond a
[25] reasonable doubt then you should find the

[1] the firearm.

[2] If after considering all the evidence you
[3] find that the Commonwealth has proven the
[4] elements just stated beyond a reasonable doubt
[5] then you should find the defendant guilty of
[6] carrying a firearm without a license.
[7] Otherwise you must find him not guilty of this
[8] offense.

[9] Finally, the defendant is charged with
[10] conspiracy. The defendant Johnnie Simmons is
[11] charged with conspiracy to commit the crime of
[12] assault and/or murder. In Pennsylvania joining
[13] in a conspiracy or creating a conspiracy is
[14] itself a crime. Even if the crime or crimes
[15] the person is planning are not carried out the
[16] members of a conspiracy are still responsible
[17] for the distinct crime of conspiracy. In
[18] general terms a conspiracy is an agreement
[19] between two or more persons to commit a crime
[20] or crimes. A conspiracy exists once two
[21] conditions are met. There is an agreement and
[22] one of the members then commits some act to
[23] help achieve the goal of the conspiracy.

[24] The first element of conspiracy is an
[25] agreement. It can be stated in words or

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[1] unspoken but acknowledged. But it must be an
[2] agreement in the sense that two or more persons
[3] have come to an understanding that they agree
[4] to act together to commit a crime or crimes.
[5] Their agreement does not have to cover the
[6] details of how that crime or those crimes will
[7] be committed nor does it have to call for all
[8] of them to participate in actually committing
[9] the crime or crimes. They can agree that one
[10] of them will do the job. What is necessary is
[11] that the parties do agree. In other words,
[12] come to a firm common understanding that a
[13] crime will be committed. Although the
[14] agreement itself is the essence of the
[15] conspiracy a defendant cannot be convicted of
[16] conspiracy unless he or a fellow conspirator
[17] does something more, does an overt act in
[18] furtherance of the conspiracy. The overt act
[19] is an act by any member of the conspiracy that
[20] would serve to further the goal of the
[21] conspiracy. The overt act can be criminal or
[22] noncriminal in itself as long as it is designed
[23] to put the conspiratorial agreement into
[24] effect. This is to show that the parties have
[25] a firm agreement and are not just thinking or

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[1] conclusion beyond a reasonable doubt.
[2] In this case the Commonwealth alleges that
[3] the defendant conspired with another unknown
[4] person. In this case the Commonwealth alleged
[5] that the crime or crimes of assault and/or
[6] murder was the object of the conspiracy. In
[7] this case the Commonwealth alleges that the
[8] following act was an overt act, to wit, the
[9] Commonwealth alleges the defendant shot the
[10] complainant. Before any defendant can be
[11] convicted all 12 jurors must agree on the same
[12] person with whom the defendant allegedly
[13] conspired the same object crime and the same
[14] overt act.
[15] Ladies and gentlemen, I have already
[16] defined for you assault. The defendant is
[17] charged with attempted murder, aggravated
[18] assault, possession of an instrument of crime,
[19] and carrying a firearm without a license. He
[20] is not charged with murder. The complainant
[21] obviously did not die. He is charged with
[22] attempted murder. Since one cannot conspire to
[23] attempt to murder someone. The defendant is
[24] charged with conspiracy to commit murder. This
[25] means that I must in addition to defining

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[1] talking about committing a crime. The overt
[2] act shows that the conspiracy has reached the
[3] action stage. If a conspirator actually
[4] commits or attempts to commit the agreed upon
[5] crime or crimes that obviously would be an
[6] overt act in furtherance of the conspiracy.
[7] But a small act or step that is much more
[8] preliminary and a lot less significant can
[9] satisfy the overt act requirement.
[10] The Commonwealth may prove a conspiracy by
[11] direct evidence or by circumstantial evidence.
[12] People who conspire often do their conspiring
[13] secretly and cover up afterwards. In many
[14] conspiracy trials circumstantial evidence is
[15] the best or only evidence on the question of
[16] whether there was an agreement. That is a
[17] common understanding. Whether the conspirators
[18] shared the intent to promote or facilitate the
[19] commission of the object crime or crimes.
[20] Thus, you may, if you think it proper, infer
[21] that there was a conspiracy from the
[22] relationship, conduct, and acts of the
[23] defendant and his alleged co-conspirators and
[24] the circumstances surrounding their activities.
[25] However, the evidence of this must support your

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[1] assault for you which I have already done I
[2] must also define murder for you.
[3] The following is the definition of murder.
[4] Murder is a criminal homicide committed with a
[5] specific intent to kill and done with malice.
[6] An intentional killing is a killing by any kind
[7] of willful, deliberate, and premeditated act.
[8] Therefore, in order to be a murder the killing
[9] must be a willful, deliberate, and premeditated
[10] act. If an intention to kill exists then in
[11] the eyes of the law the killing is willful. If
[12] this intent is accompanied by such
[13] circumstances as evidence a mind fully
[14] conscious if it's of its own purpose then it is
[15] deliberate. And if sufficient time has been
[16] afforded to enable the mind of killer to fully
[17] frame the design to kill and to select an
[18] instrument or frame the plan to carry this
[19] design into execution then it is premeditated.
[20] although a defendant must premeditate in order
[21] to have a specific intent to kill premeditation
[22] can be very brief, indeed formulated in a
[23] fraction of a second. All that is necessary is
[24] that there be time enough so that the defendant
[25] has fully formed the intent to kill and is

[1] conscious of that intention.
[2] If you believe that a defendant
[3] intentionally used a deadly weapon on a vital
[4] part of the complainant's body you may regard
[5] that as an item of circumstantial evidence of
[6] which you may infer that the defendant had the
[7] specific intent to kill.
[8] Turning now to malice. Malice has a
[9] special legal meaning. Malice may be of two
[10] **kinds**: Either direct malice as where there
[11] existed a particular ill-will against a
[12] particular person; or indirect malice, as in
[13] the case of a crime committed with depravity of
[14] heart, cruelty, recklessness of consciousness,
[15] and a disposition of mind regardless of social
[16] duty indicating and unjustified disregard for
[17] the probability of death or serious bodily
[18] injury and an extreme indifference to the value
[19] of human life. Legal malice may be inferred
[20] and found from the attending circumstances:
[21] You may infer malice from the intentional
[22] use of a deadly weapon to a violent part of a
[23] complainant's body.
[24] Now, ladies and gentlemen, in order to
[25] find the defendant guilty of conspiracy to

[1] they are responsible for each other's actions.
[2] Now, at the appropriate time you'll find
[3] on the verdict sheet that there will be a
[4] special section of the crime conspiracy. If
[5] you find the Commonwealth has proved the
[6] defendant guilty beyond a reasonable doubt you
[7] will then be asked to mark the crime or crimes
[8] that you find proven beyond a reasonable doubt
[9] to be the objective of the conspiracy. I
[10] instruct you now that a conspiracy can have as
[11] its objective one crime or many crimes. But it
[12] is your task to determine what object has been
[13] proven beyond a reasonable doubt.
[14] Ladies and gentlemen, in the course of my
[15] instructions I have given you the legal
[16] definition for the crimes charged in this case.
[17] Motive is not a part of those definitions. The
[18] Commonwealth is not required to prove a motive
[19] for the commission of the crimes charged.
[20] However, you should consider the evidence of
[21] motive or lack of motive. Knowledge of human
[22] nature tells us that an ordinary person is more
[23] likely to commit a crime or crimes if he has a
[24] motive than if he has none. You should weigh
[25] and consider the evidence tended to show motive

[1] commit assault and/or murder you must be
[2] satisfied that the following three elements
[3] have been proven beyond a reasonable doubt:
[4] First, that the defendant agreed with
[5] another person that one or more of them would
[6] engage in conduct or the planning and
[7] commission of the object crime, assault and/or
[8] murder.
[9] Second, that the defendant and the other
[10] person intended to promote or facilitate the
[11] commission of a crime or those crimes. In
[12] other words, they shared the intention to bring
[13] about that crime or those crimes or to make it
[14] easier to commit assault and/or murder.
[15] Third, that the defendant or the other
[16] person did the act that is alleged to have been
[17] an overt act and did it in furtherance of their
[18] conspiracy. It is then the conspirators have
[19] agreed to commit a crime and after that one of
[20] the conspirators does an act to carry out or
[21] advance their agreement then he has done an
[22] overt act in furtherance of their conspiracy.
[23] The other conspirator does not have to
[24] participate in the act or even know about it
[25] and essentially like partners and like partners

[1] or absence of motive along with all other
[2] evidence in deciding whether the defendant is
[3] guilty or not guilty. It is entirely up to you
[4] to determine what weight should be given to the
[5] evidence concerning motive.
[6] Now, ladies and gentlemen, I must now
[7] instruct you as to the standards by which you
[8] must be guided as you deliberate on your
[9] verdict. In order to return a valid verdict
[10] each juror must agree. Your verdict must be
[11] unanimous. A majority vote is not permissible.
[12] You as jurors have a duty to consult with one
[13] another and to deliberate with the view to
[14] reaching a unanimous agreement if it can be
[15] done without violence to individual judgment.
[16] That is to say that each juror must decide the
[17] case for himself or herself but only after an
[18] impartial consideration of the evidence with
[19] his and her fellow jurors. In a course of such
[20] deliberations a juror should not hesitate to
[21] re-examine his or her own views and to change
[22] his or her opinion if convinced that it is
[23] erroneous. But no juror should surrender his
[24] or her honest convictions as to the weight or
[25] effect of the evidence or as to the guilt or

[1] innocence of the defendant solely because of
[2] the opinion of his fellow jurors or for the
[3] mere purpose of returning a unanimous verdict.

[4] In deliberating upon your verdict you must
[5] not be influenced by anything outside of the
[6] evidence presented in this case and the law as
[7] given by this judge.

[8] Now, ladies and gentlemen, I have
[9] essentially concluded my instructions in the
[10] law. I must meet briefly with the attorneys
[11] and our reporter after which I shall return and
[12] submit the case to you for your deliberations.
[13] Please jurors bear with us for one additional
[14] moment.

[15] - - -

[16] (Discussion held on the record in
[17] chambers.)

[18] - - -

[19] **THE COURT:** We're now in the anteroom
[20] outside the hearing of the jury. I have with
[21] me Mr. Lorusso for the defendant and Ms.
[22] Forchetti for the Commonwealth. Commonwealth,
[23] I have essentially concluded my instructions on
[24] the law. This is your opportunity to submit to
[25] me a request for additional instructions,

[1] not testify that he was an eyewitness to the
[2] crime. So if I told you that he identified the
[3] defendant Simmons as the person who committed
[4] the crime I misspoke. He identified Johnnie
[5] Simmons as the person walking in the alleyway
[6] after he heard gunshots at or about the time
[7] that he heard police sirens. Is that
[8] sufficient?

[9] **MR. LORUSSO:** Yes, Your Honor.

[10] **THE COURT:** Any objection?

[11] **MS. FORCHETTI:** No, Your Honor.

[12] **THE COURT:** Is there anything else?

[13] **MR. LORUSSO:** No, Your Honor.

[14] **THE COURT:** How about you, ma'am?

[15] **MS. FORCHETTI:** No, Your Honor.

[16] **THE COURT:** I'm going to hand counsel I'm
[17] going to show you again the verdict sheet that
[18] will go out with the jury so there can be no
[19] question that this is the one we agreed upon,
[20] is that it?

[21] **MR. LORUSSO:** It is, Your Honor.

[22] **THE COURT:** Ms. Forchetti.

[23] **MS. FORCHETTI:** Yes, Your Honor.

[24] **THE COURT:** I'll give it back to
[25] Mr. Ferguson. He will give it to the jury.

[1] request for clarifications, objections,
[2] comments of any sort. Let's start with you,
[3] Mr. Lorusso.

[4] **MR. LORUSSO:** If Your Honor please the
[5] court in the instructions indicated that
[6] Charles Tolbert and Kyle Holman have IDed the
[7] defendant as the person who committed the
[8] crime. I believe the extent of any evidence
[9] concerning Kyle Holman is that he IDed someone
[10] walking or possibly running through a driveway
[11] not as a person who committed a crime and I
[12] would ask Your Honor to correct any
[13] misinformation that may have flowed from that
[14] statement.

[15] **THE COURT:** Anything else?

[16] **MR. LORUSSO:** No, Your Honor.

[17] **THE COURT:** Let's go off the record.

[18] (Discussion was held off the record.)

[19] **THE COURT:** Mr. Lorusso, your objection is
[20] founded. What I intended to say, and obviously
[21] did not say, so I intend to correct that as
[22] **follows:** Ladies and gentlemen, I charge you as
[23] to the law of identification. You will recall
[24] the evidence in this case. It is your
[25] recollection which controls. Kyle Holman did

[1] I'll make this correction and we will submit
[2] the case to the jury.

[3] - - -

[4] **THE COURT:** Ladies and gentlemen, before I
[5] conclude my instructions please permit me to
[6] make a correction the attorneys brought to my
[7] attention an apparent misstatement. I
[8] instructed you, ladies and gentlemen, in the
[9] law of identification testimony. You will
[10] recall what the evidence was and it's your
[11] recollection which controls. However, Kyle
[12] Holman did not testify that he was an
[13] eyewitness to the crimes. So if I told you
[14] that he identified the defendant Simmons as the
[15] person who committed the crime in this case I
[16] misspoke. It is my recollection that he
[17] identified Johnnie Simmons as the person
[18] walking in the alleyway after he heard gunshots
[19] at or about the time that he heard police
[20] sirens in the area.

[21] Is that a fair statement, counsel?

[22] **MR. LORUSSO:** Yes, Your Honor.

[23] **MS. FORCHETTI:** Yes, Your Honor.

[24] **THE COURT:** So you will disregard any
[25] inadvertence if I referred to him otherwise.

[1] Now, ladies and gentlemen, when you go out
[2] to deliberate on your verdicts in this case you
[3] will select one of your members as a
[4] foreperson, foreman or forewoman, and he or she
[5] will have the duty of leading you in your
[6] discussions during the deliberations. That
[7] person will also have the responsibility of
[8] announcing your verdict in open court. Bear in
[9] mind, that the foreperson has only one vote,
[10] the same as the rest of you.

[11] Now, when you, ladies and gentlemen, go
[12] out to deliberate on your verdict in this case
[13] you will take with you this verdict sheet and
[14] what is important upon this verdict sheet is
[15] what appears on the word charges in this column
[16] and what you will write under word verdict in
[17] this column. So you can see that it's styled
[18] the Commonwealth versus Simmons and it lists
[19] the various offenses charged against this
[20] defendant. You, Ladies and gentlemen, will
[21] deliberate on the verdict on the charge rather
[22] of attempted murder complainant Charles Tolbert
[23] in writing your verdict, guilty or not guilty.
[24] You, ladies and gentlemen, will deliberate on
[25] the charge of aggravated assault, complainant

[1] verdict is guilty to the charge of conspiracy.

[2] Now, in order for this verdict sheet to be
[3] valid it must be completed by your foreperson
[4] who has the duty of signing his or her name,
[5] affixing his or her juror number, and dating
[6] the verdict sheet.

[7] The last thing I wish to say, ladies and
[8] gentlemen, is to suggest to you that it will be
[9] best for all concerned if during the course of
[10] your deliberations you treat each other and his
[11] or her views and opinions with the same
[12] courtesy and respect you treat others in your
[13] every day life. I want to tell you that there
[14] is no time limit to your deliberations. You
[15] have as much time as you need.

[16] Mr. Lorusso, Ms. Forchetti, I finished the
[17] instructions, is there any objection to the
[18] first 12 selected going out and begin
[19] deliberating?

[20] **MS. FORCHETTI:** No, Your Honor.

[21] **MR. LORUSSO:** No, Your Honor.

[22] **THE COURT:** Then I'm going to first invite
[23] jurors number 13 and 14 to collect your
[24] belongings from the jury deliberation room and
[25] take a seat in the very first row in the

[1] Charles Tolbert, and write in your verdict,
[2] guilty or not guilty. You, ladies and
[3] gentlemen, will deliberate on the charge of
[4] possession of instrument of crime, to wit
[5] firearm, and write in your verdict, guilty or
[6] not guilty. You, ladies and gentlemen, will
[7] deliberate on the charge of carrying a firearm
[8] without a license and write in your verdict,
[9] guilty or not guilty. And you will deliberate
[10] on the charge of conspiracy and write in your
[11] verdict guilty or not guilty.

[12] There are two interrogatories which is a
[13] fancy word for question. The first reads:
[14] Answer only if your verdict is guilty to
[15] attempted murder. The question is, do you find
[16] that complainant suffered a serious bodily
[17] injury and you will check yes or you will check
[18] no. The second reads as follows: Answer only
[19] if your verdict is guilty to conspiracy. The
[20] question is, what was the object crime? Murder
[21] and/or aggravated assault.

[22] Remember, I told you there may be one or
[23] more object crimes so you will articulate or
[24] rather check what, if any, to be the object
[25] crime proved beyond a reasonable doubt if your

[1] courtroom. Everybody in the courtroom would
[2] you please, please, please sit in the very last
[3] row.

[4] - - -
[5] (Jurors 13 and 14 were excused.)
[6] - - -

[7] **THE COURT:** Ladies and gentlemen, to you
[8] jurors, number one through 12, you are now a
[9] deliberating body. You may retire to commence
[10] your deliberations. Thank you very much.

[11] - - -
[12] (The jury exited the courtroom and
[13] began deliberations at 4:20 p.m.)
[14] - - -

[15] **THE COURT:** Let the record also reflect
[16] the jurors number one through 12 have exited
[17] the courtroom. I shall now like to address
[18] jurors number 13 and 14.

[19] Ladies and gentlemen, you are not yet
[20] excused. I want you to appreciate the
[21] **following:** That this is a matter of great
[22] importance to both sides and it is of course a
[23] human event and we are attempting to guard
[24] against anything that might go awry. So please
[25] as I instructed you previously do not discuss

[1] the case amongst yourselves, don't permit
[2] anyone to discuss the case with you. The first
[3] 12 deliberating have the obligation of reaching
[4] a verdict in this case. However, if for some
[5] reason one or two of them cannot conclude the
[6] deliberative process it will be necessary to
[7] call upon one or both of you to fill in. In
[8] such an event it is absolutely required that
[9] you have not discussed the case. So to that
[10] end you are obviously free to go about your
[11] duties as members of society, go to work, but
[12] you may not discuss the case with people at
[13] work nor will you discuss the case with any of
[14] your family members. You may not discuss the
[15] case with anyone. You may not discuss the case
[16] with yourselves. Commencing tomorrow at
[17] 10:00 o'clock and again at 4:00 o'clock you are
[18] instructed to call the courtroom asking
[19] Mr. Ferguson and he will tell you whether or
[20] not the jury has reached a verdict. If they
[21] have then you are excused. If it is necessary
[22] for him to call upon you he will so advise you
[23] and you will be required to come down and join
[24] the remaining jurors at which time the
[25] deliberation will start afresh with you as a

[1] in place until such time that 13 and 14 have
[2] left the floor. Jurors deliberating,
[3] Mr. Lorusso, shall we have your client
[4] accompany the sheriff?
[5] **MR. LORUSSO:** That's fine, Your Honor.
[6] **THE COURT:** All right. We'll see what
[7] happens in the next 15 minutes or so.
[8] (Court took a short recess.)
[9] **MS. FORCHETTI:** Your Honor, we looked
[10] through the photographs and the exhibit I think
[11] the only ones to which counsel and I would not
[12] have an objection on either side is all the
[13] crime scene photographs, the photographic array
[14] that's been marked as Commonwealth's Exhibit
[15] 10, and the track of the 911 testimony that we
[16] played track 17 as it relates to Kyle Holman's
[17] 911 call, and the map which has been marked as
[18] Defense Exhibit 1.
[19] **THE COURT:** Those are the ones you can
[20] agree on?
[21] **MS. FORCHETTI:** We can agree on that they
[22] can go back. Anything else I think would be
[23] subject to argument.
[24] **THE COURT:** Okay. So Mr. Menna, can you
[25] get a file to put these in. Those are the ones

[1] deliberating juror. Do you understand, juror
[2] number 13?
[3] **THE WITNESS:** Yes.
[4] **THE COURT:** Do you understand me, juror
[5] number 14?
[6] **THE WITNESS:** Yes.
[7] **THE COURT:** Thank you kindly and Mr. Menna
[8] will instruct you downstairs and you enjoy your
[9] evening and please call us tomorrow at 10:00
[10] and again at 4:00 and we will let you know
[11] where we stand. Thank you very much.
[12] (Alternate jurors excused.)
[13] **THE COURT:** Counsel, it's coming up on
[14] 4:25. We've had a full day. How long you
[15] suggest we stay this afternoon, Mr. Lorusso?
[16] **MR. LORUSSO:** 4:30 works for me, Judge.
[17] **THE COURT:** Ms. Forchetti.
[18] **MS. FORCHETTI:** I would say until
[19] 5:00 o'clock.
[20] **THE COURT:** All right. So a quarter to
[21] 5:00 we'll tell them that they start afresh
[22] tomorrow if they have not reached a verdict.
[23] That's cutting it down the middle. Let the
[24] record reflect that 13 and 14 have left the
[25] courtroom. Everybody who is in the room remain

[1] you agree on right there.
[2] **MS. FORCHETTI:** Yes.
[3] **THE COURT:** What are the others, those
[4] others need rulings?
[5] **MS. FORCHETTI:** Yes.
[6] **THE COURT:** Okay.
[7] **MS. FORCHETTI:** Obviously, Your Honor, if
[8] they want to be recharged on any portion of the
[9] law I won't object to that.
[10] **THE COURT:** All right. But you expect to
[11] be here by what.
[12] **MS. FORCHETTI:** A little after 11:00 is my
[13] hope.
[14] **THE COURT:** If they have something in the
[15] morning and it's something we can hold off on I
[16] will.
[17] Counsel, shall we prepare ourself to
[18] release the jurors until tomorrow?
[19] **MS. FORCHETTI:** I believe it's reached the
[20] agreed upon hour.
[21] **MR. LORUSSO:** Yes, Your Honor.
[22] - - -
[23] (The jurors entered the courtroom at
[24] 4:50 p.m.)
[25] - - -

[1] **THE COURT:** Ladies and gentlemen, it's
[2] just past 4:45 p.m., 4:50 p.m. It's been a
[3] long day. You've been here since nine o'clock
[4] this morning. We are at this juncture going to
[5] take an evening recess. We will adjourn for
[6] the day. I think it's important that I
[7] reiterate the instructions that you keep an
[8] open mind and remind you that you may not
[9] discuss the case with anyone. Ladies and
[10] gentlemen, you can't call a fellow juror and
[11] discuss the case on the telephone. The only
[12] time that you may discuss the case is when the
[13] 12 of you are together in the jury room
[14] deliberating. So with that in mind please have
[15] a good evening and we'll see you all back here
[16] tomorrow at 9:00. Would everyone else please
[17] remain in place while the jurors exit the
[18] courtroom?
[19] - - -
[20] (The jury exited the courtroom at
[21] 4:52 p.m.)
[22] - - -
[23]
[24]
[25]

CERTIFICATION

I hereby certify that the proceedings
and evidence are contained fully and accurately
in the notes taken by me on the trial of the
above cause, and that this copy is a correct
transcript of the same.

Kim S. Kendall, RPR
Official Court Reporter

(The foregoing certification of
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